87-2066

No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION,
INTERNATIONAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Act of State Doctrine bar adjudication of an action which would require judicial determination of whether the Government of Nigeria acted illegally in performing an act of state and which would *prima facie* have an impact on foreign relations?

2. Does a complaint properly allege facts establishing a pattern of racketeering activity under the Racketeering Influenced and Corrupt Organizations Act when that complaint alleges only that defendants had engaged in one non-continuous, completed scheme to influence improperly the award of a single contract?

PARTIES TO THE PROCEEDINGS BELOW

Environmental Tectonics Corporation, International was the plaintiff below. W.S. Kirkpatrick & Co., Inc., D.I.C. (Holding) Inc., Harry G. Carpenter, John M. Krankel, W.S. Kirkpatrick & Co., International, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards were named and served as defendants below. International Development Corporation, S.A. and Benson "Tunde" Akindele were named as defendants below but never served. Development Industrial Corporation was named and served as a defendant in the complaint but was dropped from an amended complaint that was filed subsequently.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, petitioners state that D.I.C. (Holding) Inc. is the parent of W.S. Kirkpatrick & Co., Inc.; W.S. Kirkpatrick & Co., International is a subsidiary of W.S. Kirkpatrick & Co., Inc.; and International Development Corporation, S.A. is the parent of D.I.C. (Holding) Inc. W.S. Kirkpatrick & Co., Inc. has the following affiliates: Development Industrial Corporation, TIA Electric Co., Inc., Aeronautical Equipment Corp., R. Bruce Fike & Sons Dairy, Inc., Bulk Investments Corp., Daisy Lane Dairy, Deep Creek Creamery, Inc., and Interhotels of America, Inc.

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No.

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— VS. —

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATION TO OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an opinion in this case on May 2, 1988. The opinion, which has not yet been reported, has been reprinted at pages A. 1 through A. 37 of the Appendix attached hereto.

The United States District Court for the District of New Jersey issued an opinion in this case on May 1, 1987. The opinion is reported at 659 F. Supp. 1381 (D. N.J. 1987) and has been reprinted at pages A. 38 through A. 75 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 2, 1988 reversing and remanding the dismissal of the action on grounds of the Act of State Doctrine and the dismissal of the claims under the Racketeering Influenced and Corrupt Organizations Act and the New Jersey Anti-Racketeering Act. A copy of this Judgment has been reprinted at pages A. 76 through A. 78 of the Appendix. The decision dismissing the action and these claims was entered by the United States District Court, District of New Jersey on May 1, 1987. On May 26, 1988, the Third Circuit stayed the issuance of a formal mandate until June 22, 1988, which stay will continue until final disposition by this Court if the Third Circuit receives notice by June 22, 1988 that a petition for a writ of certiorari has been filed. A copy of this Order has been reprinted at page A. 79 of the Appendix. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND DOCTRINES INVOLVED

The Act of State Doctrine, created by this Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), which states:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The Robinson-Patman Act, 15 U.S.C. § 13(c), which states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary

> is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(a), which states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The New Jersey Anti-Racketeering Act, N.J.S. 2C:41-2, which states:

> It shall be unlawful for any person who have received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce.

STATEMENT OF THE CASE

Factual Background

In 1981, a New Jersey corporation, W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), through a subsidiary, W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), entered into a

contract with the Government of Nigeria. The contract provided for Kirkpatrick International to develop an aeromedical center at the Kaduna Air Force Base in Kaduna, Nigeria. The contract was awarded to Kirkpatrick International by the Ministry of Defense of the Nigerian government.

In approximately 1984, the United States Department of Justice commenced a grand jury investigation into the circumstances surrounding the award of the 1981 contract. Kirkpatrick, which was then under new management, fully cooperated with the government in its investigation. In the course of the investigation, Kirkpatrick uncovered evidence which showed that an agent hired by Kirkpatrick, Benson "Tunde" Akindele, had represented to Kirkpatrick that officials and representatives of the Government of Nigeria had demanded that Kirkpatrick pay bribes to them in order to be awarded the contract. The evidence showed that, faced with these demands, Kirkpatrick's former management had apparently agreed to make payments to that agent with the understanding that he would cause bribes to be paid to officials or representatives of the Nigerian Government. Although this evidence did not establish that a bribe actually was paid to anyone, the mere offer of payment or agreement to pay alone violates the Foreign Corrupt Practices Act, 15 U.S.C. § 78 dd-2. Accordingly, Kirkpatrick pled guilty to one count of violating the act and was sentenced to a fine of $75,000.

The Civil Action

Following the conclusion of the criminal action, ETC filed a complaint in United States District Court for the District of New Jersey. The jurisdiction of the Court was invoked pursuant to 18 U.S.C. §1964, 15 U.S.C. §15 and principles of pendent jurisdiction. The complaint alleged that ETC was the competing bidder for the Kaduna contract and that ETC would have been awarded the contract but for defendants' payment of bribes. The complaint also alleged that in order to obtain that one contract the defendants had agreed to pay and had paid a single bribe in a series of installments through one intermediary, Akindele, for distribution to certain unnamed Nigerian officials. ETC

claimed violations of the Robinson-Patman Act, 15 U.S.C. § 13(c), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically 18 U.S.C. §§ 1962(b), (c) and (d), and the New Jersey Anti-Racketeering Act, N.J.S. 2c:41-2. A total of eleven defendants were named in the complaint, including Kirkpatrick and Kirkpatrick International.

Kirkpatrick and several other defendants moved to dismiss the complaint, alleging *inter alia* that the action was precluded by the Act of State Doctrine. Kirkpatrick argued that adjudication of this action would *prima facie* impact upon relations between this country and the Government of Nigeria in a manner and to an extent that would be far more offensive and embarrassing to the Government of Nigeria than was adjudication of the criminal action.

First, this action would mandate adjudication of whether Nigerian government officials actually were paid bribes by Kirkpatrick's agent, Akindele. The criminal action did not reach or resolve that issue because, under the Foreign Corrupt Practices Act, the mere payment of money to Akindele with the understanding that he would pay bribes constituted a violation. Second, this action would necessarily involve proof as to the identity of the individual officials and representatives who allegedly accepted bribes and of all the specifics of the alleged bribe giving and taking. In the criminal prosecution, such specific information was superfluous since there was no need to prove that a bribe was actually ever paid. Third, unlike the criminal action, this action would adjudicate whether demanding and receiving bribes is customary for the Government of Nigeria. This issue cannot be avoided since, in order for ETC to prove causation, ETC would have to prove that it would have been awarded the contract without paying a bribe. A primary defense of the defendants would be that bribes are always extorted by Nigerian government officials and that in order to do business with the Nigerian government, bribes must be paid to its officials and representatives. Thus, defendants would necessarily attempt to prove that ETC would have been forced to pay a similar bribe in order to be awarded the contract and that, therefore, ETC has no standing to complain as to the payment of one by Kirkpatrick.

In considering the Act of State issue, the District Court invited the Department of State to offer input on whether it objected to adjudication on foreign relations grounds. The State Department responded by letter that adjudication could prove detrimental to foreign relations with Nigeria. However, the letter also stated, in contradictory fashion, that the State Department did not believe that adjudication was barred by the Act of State Doctrine. The District Court determined that this letter provided no guidance about whether the action could be adjudicated.

Also, while awaiting a response from the State Department to the Court's invitation to offer input, ETC privately wrote to the Nigerian government seeking a statement that the government has no objection to adjudication of this action. The government did not respond to ETC's request.

The District Court decided that the action was barred by the Act of State Doctrine and must be dismissed. The Court also held that the complaint failed to plead a pattern of racketeering activity under RICO.

REASONS FOR GRANTING THE WRIT

1. *The Third Circuit's Decision Creates a Direct and Irreconcilable Conflict Among Several Circuits Regarding the Proper Application of the Act of State Doctrine*

A. *The Conflict*

The decision of the Third Circuit in this case squarely and irreconcilably conflicts with a decision reached by the Ninth Circuit on substantially indistinguishable facts. *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983). The conflict, which regards the proper application of the Act of State Doctrine, impacts upon this country's conduct of foreign relations as well as the fundamental constitutional principle of separation of powers. Since this case presents a direct conflict between circuits involving important constitutional issues,

certiorari should be granted. *See Aldinger v. Howard*, 427 U.S. 1, 3 (1976); Rules of the Supreme Court of the United States, Rule 17.1(a).

In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco, the plaintiff, alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental, the defendant, the contract after Occidental paid the minister and his son more than $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06.

The district court dismissed Clayco's lawsuit on Act of State grounds and the Ninth Circuit affirmed the dismissal. The Ninth Circuit held that since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco is on all fours with this case. Here, as in *Clayco*, the plaintiff and the defendants were in competition for a contract with a foreign government. The plaintiff alleged that it would have been awarded the contract but for the defendants' payment of bribes to foreign officials and representatives. The defendants' conduct came under scrutiny by officials in this country, resulting in confirmation that the defendants had violated the laws of this country. The plaintiff then sued on grounds that its rights had been violated.

The similarity between this case and *Clayco* is underscored by the failure of ETC and the Third Circuit even to attempt to

distinguish *Clayco*. Rather, ETC argued, and the Third Circuit found, that the Ninth Circuit's holding in *Clayco* was simply wrong. *See* Transcript of Argument on November 20, 1987, at 7; *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546 at 17 (3rd Cir. May 2, 1988) ("Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court. . .").

This conflict regarding the proper application of the Act of State Doctrine extends to the Second Circuit as well since that circuit favors the view of the Act of State Doctrine that is reflected in *Clayco*. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). In *Hunt*, the Second Circuit held that the Act of State Doctrine rendered nonjusticiable a claim that required inquiry into the motives of a foreign government in performing certain acts. Citing *Hunt*, the Third Circuit here suggested that the Second Circuit's interpretation of the Act of State Doctrine is excessively strict. *Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.* Nos. 87-5328 and 87-5546 at 17 n.9.

Similarly, in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987), *petition for cert. filed*, (U.S. Feb. 8, 1988) (No. 87-1350), the Second Circuit again held that adjudication was precluded by the Act of State Doctrine when an action required inquiry into the motives of a foreign government in performing certain acts.[1]

---

[1] The plaintiff in *O.N.E.* recently filed a Petition for a Writ of Certiorari, which is pending before this Court. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *petition for cert. filed*, (U.S. Feb. 8, 1988) (No. 87-1350). The existence of this petition further demonstrates the importance of this issue and the need for resolution by this Court. However, *O.N.E.*, which involved several issues, including comity and foreign compulsion considerations, does not present as straightforward an Act of State issue as is presented here. Thus, this action provides a better vehicle for this Court to delineate the parameters of the doctrine.

B. *The Importance Of The Issue*

This Court recognized years ago in *Banco Nacional de Cuba v. Sabbatino* that the Act of State Doctrine bears importantly "on the conduct of this country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964). Indeed, the importance of these issues was the reason why this Court granted *certiorari* in that case. *Id.* More than two decades later, the proper construction and application of the Act of State Doctrine remains as critical as ever to both our conduct of foreign relations and the proper role of the judiciary. Thus, *certiorari* should be granted here to eliminate the conflict and confusion which has been generated by the recent decisions on this issue.

2. *The Third Circuit's Decision That The Act of State Doctrine Does Not Proscribe Adjudication Of This Action Is In Conflict With Applicable Decisions of This Court*

The classic statement of the Act of State Doctrine is set forth in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

As this Court stated in *Sabbatino*, the doctrine expresses the strong sense of the judiciary that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. *Sabbatino*, 376 U.S. at 423.

The Third Circuit's decision is in direct conflict with the doctrine as outlined by this Court in *Underhill* and *Sabbatino*. According to the decision, the Act of State Doctrine does not bar

adjudication of this action for two basic reasons: (i) adjudication would require at most an inquiry into the motivations behind, rather than the legality of, the foreign government's acts; and (ii) defendants failed to demonstrate that adjudication was bound to result in conflict between the executive and the judiciary. *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546 at 23. Thus, the Third Circuit apparently reasoned that judicial inquiry into the motivations behind a foreign government's acts is permissable under the doctrine and that defendants who invoke the doctrine must prove that conflict between the judiciary and the executive is an inevitable consequence of adjudication.

Contrary to the Third Circuit's decision, the holding and reasoning of *Sabbatino* make clear that inquiry by the courts of this country into whether foreign government officials were influenced by bribery in the award of a government contract is exactly the sort of inquiry that the Act of State Doctrine was designed to proscribe. *Sabbatino*, 376 U.S. at 401. If the doctrine, as created by this Court, has any meaning at all, it must mean that the courts of this country shall not sit in judgment on whether Nigerian government officials or representatives demanded in this case that bribes be paid to them, whether they awarded the contract on the basis of those bribes and whether they customarily demand bribes from anyone who wishes to do business with their country. Since bribery is almost universally recognized as a crime, adjudication of these questions by the courts of this country would necessarily be offensive to the government of Nigeria. Adjudication therefore would inevitably affect our relations with that government as well as relations between the executive and the judiciary.

3. *The Third Circuit's Finding That a Pattern Exists Under RICO Conflicts Directly with Sedima and with Decisions of Several Other Circuits*

This Court recently recognized the need for clarity in the determination of what is a RICO pattern by granting *certiorari* in

H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S. Ct. 1219 (1988). This case would make an excellent companion case to *H.J.* and consideration of it by this Court along with *H.J.*, which involved bribery allegations of a much more pervasive and variegated nature than present here, would help facilitate this Court's efforts to clarify an area of law that has been aptly characterized as "sheer bedlam." *See Furman v. Cirrito*, 828 F.2d 898, 909 (2d Cir. 1987) (Pratt, J., dissenting).

In *H.J.*, petitioners allege that from 1980 through the present, respondent Northwestern Bell attempted to, or did, bribe commissioners of the Minnesota Public Utilities Commission through a variety of methods. At least three distinct, dissimilar acts of bribery were described in the complaint, one involving payments made to commissioners through a middleman, one involving payments made to a former commissioner in "consulting fees", and one involving the payment by respondent for parties, gifts and meals for commissioners. *See* Petition for Writ of Certiorari, *H.J. Inc. v. Northwestern Bell Tel. Co.* (87-1252) (filed Jan. 20, 1988), at 5. The Eighth Circuit dismissed the complaint on grounds that only one scheme existed for purposes of RICO and therefore that the pattern requirement was not satisfied. *H.J., Inc.*, 829 F.2d at 650. On March 21 of this year, this Court agreed to review that decision.

The Eighth Circuit's decision reflects what has been characterized as the restrictive interpretation of RICO's pattern requirement. According to this interpretation, a RICO pattern exists only when a complaint alleges multiple separate criminal schemes or episodes. *E.g. Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The approach is the opposite of the liberal view, which holds that two related acts may constitute a pattern when committed in furtherance of a single scheme. *E.g. United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986). Between these views lies the moderate approach, which involves the analysis of a number of factors to determine whether a pattern has been alleged. *See Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1286 (D. Virgin Islands 1987).

In this case, the Third Circuit expanded the liberal approach in finding that a RICO pattern had been pleaded and therefore stands at the opposite end of the spectrum from *H.J.*. Here, the Third Circuit found that even though only one series of payments to effectuate a single bribe was alleged, the pattern requirement was nonetheless satisfied. *See Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc.*, Nos. 87-5328 and 87-5546, at 25-26. Thus, there was *less* reason here to find a pattern than in *H.J.*, yet in this case a pattern was found to have been properly pleaded.

An affirmance by the Court of the decision in *H.J.* would necessarily determine whether a RICO pattern has been alleged in this case. However, a reversal of the decision in *H.J.* would not necessarily resolve that issue in this action or determine whether the "moderate" or "liberal" approach to determining what is necessary for a RICO pattern is appropriate or whether some variation ought to be applied. Thus, given the facts and decisions in this case and *H.J.*, this case would be an excellent companion case to be decided along with *H.J.* because, with two cases at opposite ends of the spectrum, the RICO pattern issue could be fully considered and resolved.

In any event, if this Court determines that its ruling in *H.J.* will fully resolve what is necessary to establish a RICO pattern, this Court should defer ruling on this petition for *certiorari* insofar as it relates to the pattern issue until after it decides *H.J.* *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (petition held by this Court until decisions were rendered in other cases raising similar issues).

CONCLUSION

It should be resolved whether the Act of State Doctrine bars adjudication of actions which require judicial determination whether a foreign government acted illegally in performing an act of state and which would *prima facie* have an impact on foreign relations. It also should be resolved whether a complaint properly alleges facts establishing a pattern of racketeering activity when that complaint alleges only that defendants had engaged in one non-continuous, completed scheme to influence improperly the award of a single contract. For these reasons, and all other reasons herein, *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.,
IDC INTERNATIONAL
S.A. LUXEMBOURG,
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING
CO., INC., ROSS E. SAXON c/o NAUTILUS
ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.,

Appellants in No. 87-5546

On Appeal from the United States District
Court for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Argued November 20, 1987

BEFORE: GREENBERG and SCIRICA, *Circuit Judges*
and POLLAK, *District Judge**

(Filed May 2, 1988)

THOMAS H. SEAR, ESQ. (Argued)
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Environmental Tectonics
International, Inc.

---

* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

THEODORE V. WELLS, JR., ESQ.
ROBERT L. KRAKOWER, ESQ. (Argued)
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Harry G. Carpenter

OPINION OF THE COURT

POLLAK, District Judge:

Appellant Environmental Tectonics Corporation International ("ETC"), a Pennsylvania corporation, brought this action to recover damages against several defendants for, *inter alia*, violations of the federal Racketeering Influenced Corrupt Organizations Acts, 18 U.S.C. §§ 1962-1968, the New Jersey Anti-Racketeering Act, 2C N.J.C.S. § 41-1, and the Robinson-Patman Act, 15 U.S.C. 13(c). Essentially, ETC claims to have been injured by an apparently successful scheme, allegedly participated in by all of the defendants, to influence the award of a Nigerian defense contract through bribery of Nigerian government officials. The district court concluded that the act of state doctrine barred adjudication of ETC's claims, and dismissed the action in its entirety. In the alternative, the court also ruled on other substantive and procedural issues.

I.

This action arose from the award of a contract by the Federal Republic of Nigeria to defendants W. S.

Kirkpatrick & Co. ("Kirkpatrick") and W. S. Kirkpatrick & Co. International ("Kirkpatrick International"), both of which are New Jersey corporations. Kirkpatrick is in the business of selling and brokering aircraft equipment, parts and facilities to airlines and foreign air forces. Kirkpatrick International, its wholly-owned subsidiary, was formed to carry out Kirkpatrick's duties under the contract to be awarded by the Nigerian government. Also named as defendants were Kirkpatrick's parent corporations, DIC (Holding) Inc. ("DIC"), a Delaware Corporation, and International Development Corporation, S.A. ("IDC"), a Luxembourg corporation.

In 1980, when the events alleged in the amended complaint[1] began, defendant Harry Carpenter was chairman of Kirkpatrick's board of directors and the company's chief executive officer. In 1980, Carpenter learned that the Nigerian government was interested in purchasing aeromedical equipment, and in constructing and equipping an aeromedical center for the Nigerian Air Force at Kaduna Air Force Base (the "Air Force contract"). Kirkpatrick contracted with defendants Emro Engineering Co., Inc. ("EMRO") and Nautilus Environmedical Systems, Inc. ("Nautilus") to provide engineering, design and related assistance needed to build the proposed facility and to supply the equipment.

Carpenter hired a Nigerian national, defendant Benson ("Tunde") Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the Air Force contract. In or around March of 1981, Carpenter and Nautilus president Ross Saxon[2] met with Akindele to

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1. The following factual recital is based primarily on the amended complaint.

2. Saxon and Robert Ruppert, Emro's president, were also named as defendants. Two other Kirkpatrick officers, Robert H. Edwards and John M. Krankel, were named as well.

discuss their bid strategy. According to a contemporaneous memorandum written by Carpenter, Akindele told Carpenter and Saxon that to secure the bid Kirkpatrick should be prepared to pay a sales commission totalling twenty percent (20%) of the contract price. Most of this commission was to be paid to Nigerian political and military officials.[3] Akindele explained that Nigerian officials generally expected such payments from contract bidders, and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.

Through a written agreement with Akindele, Kirkpatrick agreed to pay the commissions to two Panamanian corporations. In May of 1981, these corporations -- which were controlled by Akindele -- were established to receive the commissions and to distribute them to Nigerian officials. On March 19, 1982, the Nigerian Defense Ministry entered into an agreement awarding the Air Force contract to Kirkpatrick International. In September of 1982, the Nigerian government made the first of four contract payments to Kirkpatrick. The remaining payments were made in December of 1982, in February of 1983, and in August of 1983. After each of the four contract payments, the defendants via the United States mails and wire transfers paid a portion of the promised commissions to Akindele's Panamanian corporations, whence the monies were distributed to Nigerian officials. In the end, Kirkpatrick's commission payments to the Panamanian corporations, and thus,

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3. ETC alleged in its complaint that the 20% commission was to be distributed as follows: 2 1/2% for Akindele, 5% for the Nigerian Air Force, 2 1/2% for the medical group, 5% for a political party, 2 1/2% for the relevant cabinet minister, and 2 1/2% for other key defense personnel.

to Akindele and various Nigerian officials, totalled over $1.7 million.

In the latter half of 1981 and 1982, while Kirkpatrick was implementing the bid strategy described above, ETC, which is also in the business of selling aeromedical equipment to foreign governments, was preparing its own bid for the Air Force project. ETC submitted its pricing information to the Nigerian government in February of 1981, and it continued in contact with Nigerian military and diplomatic officials throughout the course of that year. ETC's president met with Nigerian officials in Nigeria, and submitted a formal bid for the Air Force contract in December of 1981. ETC submitted its final formal bid in February of 1982, a month before the Nigerian government awarded the contract to Kirkpatrick.

ETC states that it decided to investigate the Nigerian government's award of the Kaduna contract to Kirkpatrick in April of 1983, after learning that its bid had been far lower than Kirkpatrick's. ETC reported its findings to the Nigerian Air Force[4] and to the United States Embassy in Lagos, Nigeria. After an investigation by the United States Justice Department, Carpenter and Kirkpatrick each were charged with violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (hereinafter "FCPA").

As part of its plea negotiations on the United States charges, Kirkpatrick and Carpenter both agreed to offers of proof which outlined the Air Force contract scheme in its entirety, including Carpenter's hiring of Akindele, and Akindele's control of the Panamanian corporations. Both offers of proof also stated that Akindele and Carpenter agreed that the money paid to

4. Both bribery and the acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No.38 (November 22, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

the Panamanian corporations as commissions would be distributed to Nigerian political and military officials. Carpenter and Kirkpatrick both pled guilty to one FCPA violation, and were eventually sentenced: Carpenter to two hundred hours of community service and a fine of $10,000, and Kirkpatrick to a fine of $75,000, payable over a five-year period.[5]

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5. At Kirkpatrick's sentencing on January 6, 1986, Assistant United States Attorney Steven Levy, who was in charge of Carpenter's and Kirkpatrick's prosecutions, made the following representation to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated [sic]. ...I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals [,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names.....

Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22.

ETC filed this action shortly after Kirkpatrick's sentencing. Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which contended, *inter alia*, that the plaintiff had failed to allege a "pattern of racketeering activity" as required by the federal and state RICO statutes. ETC filed an amended complaint that responded to some of the issues raised by the defendants' motion to dismiss, and that added common law counts to ETC's antitrust, RICO, and anti-racketeering counts. ETC also filed an answer to the remainder of the defendants' motion to dismiss.

In their reply to ETC's answer to their motion, defendants moved for dismissal of the action in its entirety on act of state grounds. The district court requested further submissions from the parties in the form of answers to specific questions. The court also requested a *Bernstein* letter, i.e., an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by this case.[6] Legal Adviser Abraham Sofaer responded to

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6. The term "*Bernstein* letter" is derived from the Second Circuit's opinion in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). Plaintiff Bernstein, a German national, owned a corporation that was confiscated by the Nazi government during World War II. The corporation's main asset was a ship; Bernstein was forced to relinquish title to the ship, as well as all other interest in the corporation. The Second Circuit initially dismissed Bernstein's suit against the ship's subsequent owners on act of state grounds. *See Bernstein v. Van Heygen Freres Societe Anonyme*, 163 F.2d 246 (2nd Cir. 1947). The court reversed itself after receiving a letter from the State Department's Legal Adviser, which stated that it was United States policy to permit the courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials.

The Supreme Court subsequently determined that, while it was proper for a federal court to consider a *Bernstein* letter,

the court's request in a letter dated December 10, 1986, which is appended to this opinion. Treating defendants' motion to dismiss as a motion for summary judgment, the district court dismissed the action on act of state grounds. *See Environmental Tectonics Corp., International v. W.S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381, 139198 (D.N.J. 1987).

Although the dismissal on act of state grounds embraced ETC's entire claim against all the defendants, the district court went on to rule, in the alternative, on other issues: The court rejected defendants' contention that ETC lacked standing to assert antitrust and RICO claims. The court did, however, dismiss the RICO count for failure to allege a pattern of racketeering activity. For the same reason, the court dismissed the New Jersey Anti-Racketeering count. In addition, the court upheld a magistrate's determination that Carpenter was entitled to decline to answer, on Fifth Amendment grounds, certain questions put to him on deposition. Finally, the court held that ETC's amended complaint adequately stated a case for holding IDC and DIC legally responsible for Kirkpatrick's scheme to obtain the Air Force contract.

ETC appeals from the act of state, RICO, and Fifth Amendment rulings. The defendants, in addition to urging the correctness of these rulings, have cross-appealed from those alternative rulings that were

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the Legal Adviser's recommendation in any given case was not to be considered binding on the court. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), Justice Rehnquist, announcing the judgment of the court, argued that the federal courts should defer to the view of the State Department; but only two other members of the court, Chief Justice Burger and Justice White, joined in his opinion. Justices Douglas and Powell, each of whom concurred separately, rejected the view that the State Department's view should control. So, too, did Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun in dissent.

adverse to them. Since the district court's grant of summary judgment on act of state grounds, if affirmed here, would obviate consideration of all other issues, we turn first to the act of state question.

II.

On review of a district court's grant of summary judgment, we utilize the same standard that the district court was required to apply. *See Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3rd Cir. 1987). There is no real disagreement on the facts relevant to the district court's act of state determination. On this appeal, therefore, we are called upon to decide whether the appellees were entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

ETC's challenge to the district court's grant of summary judgment raises important issues about the proper application of the act of state doctrine. The doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of this country will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders. *See Restatement (Revised) of Foreign Relations Law of the United States* § 469[428] (1986). The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 694 (1976); *Williams v. Curtiss-Wright*, 694 F.2d 300, 303 n.4 (3rd Cir. 1982).

Although earlier formulations of the doctrine were grounded in notions of comity among sister states,[7]

7. *See Underhill v. Fernandez*, 168 U.S. 250, 252 (1898); *Restatement (Revised) of U.S. Foreign Relations Law* § 469 [428] comment a.

the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government -- especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* at 423. Thus, courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. *See First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972) (hereinafter "*Citibank*").

Sensitively applied, the doctrine can prevent judicial entanglement in international conflicts that are more appropriately resolved through political channels. Individual litigants and the enforcement of national policies pay a price, however, for this institutional self-discipline -- its application in effect means that "on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy." *Citibank*, 406 U.S. at 769 (opinion of Rehnquist, J.). For this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case. *See id.* at 775-76 (Powell, J. concurring); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3rd Cir. 1979) (courts should

analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role).

The main issue raised by ETC's appeal involves the proper application of the doctrine when a litigant invokes the doctrine as a defense to a suit for damage or injury stemming from a course of events that included some acts by officials of a foreign government. *Sabbatino* and the Supreme Court's other modern act of state cases have focused on state expropriations of private property, the clearest example of a political act that, to paraphrase Justice Harlan, touches on the nerves of the international community. *See Sabbatino*, 376 U.S. at 428. This has, however, left a broad range of governmental conduct -- *e.g.*, court decisions; the granting of a license, patent, or some other state monopoly; or, as in this case, the award of a construction or procurement contract -- for lower courts to consider.

The appellant has advanced several objections to the district court's act of state determination. Two of these objections lack merit. First, we agree with the district court's conclusion that the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine. It is true that certain governmentally authorized acts, such as the award of a patent or the acts of a bankruptcy trustee, are considered so routine as to be not of substantial concern to the political branches in their conduct of foreign policy. *See Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3rd Cir. 1987); *Mannington Mills*, 595 F.2d at 1294. But the award of a major defense contract generally does not result from a near-mechanical exercise of narrowly-defined governmental discretion. The award of a military

contract, particularly one for a major project, is usually influenced by national security considerations -- considerations that are far from routine.

We also agree with the district court that the so-called "commercial" exception to the act of state doctrine -- an exception endorsed by a plurality of the Supreme Court but neither acquiesced in nor rejected by a majority, *see Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) -- has no application to this case.[8] Under the commercial exception's terms, a court would not abstain from deciding a case involving the purely commercial act of a sovereign or one of its instrumentalities. *See Dunhill*, 425 U.S. at 695 (plurality opinion of White, J.). To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit. *Cf. Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2nd Cir. 1984)(applying the Foreign Sovereign Immunity Act's definition of "commercial"), *cert. denied* 471 U.S. 1125 (1985); *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2nd Cir. 1981)(same), *cert. denied* 454 U.S. 1148 (1982). While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental. *See Curtiss-Wright*, 694 F.2d at 302.

We part company with the district court, however, on the remainder of its act of state analysis. The district court employed a formulation of the doctrine that barred the adjudication of ETC's claims "if the inquiry presented for judicial determination includes

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8. In *Curtiss-Wright*, 694 F.2d at 302 n.2, this court noted that the commercial exception has not been endorsed by a majority of the Supreme Court. We have no occasion here for going beyond what was said in *Curtiss-Wright*.

the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of the foreign policy of the United States." *ETC*, 659 F. Supp. at 1392-93. The court found that adjudication of ETC's claims would lead inevitably to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick. Because the district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government, it concluded that this case presents the type of situation which precludes judicial inquiry. *See id.* at 1393.

In reaching its conclusion, the district court relied primarily on the interpretation of the act of state doctrine advanced in a Ninth Circuit case, *Clayco Petroleum v. Occidental Petroleum*, 712 F.2d 404 (9th Cir.), *cert. denied* 464 U.S. 1040 (1984). In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental the contract after Occidental paid the minister and his son over $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06. The district court dismissed *Clayco*'s lawsuit on act of state grounds.

In a *per curiam* opinion, the Ninth Circuit affirmed the dismissal, concluding that the act of state

doctrine barred adjudication of Clayco's claims. Although calling for a "flexible" approach to the doctrine's application, the court expressed its unwillingness to permit judicial inquiry into the motivation behind Um Al Quywayn's award of the concession. Since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the court concluded that the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine "is not lightly to be imposed...."[9] *Mannington Mills*, 595 F.2d at 1293. In *Mannington Mills*, the plaintiff claimed that defendant Congoleum violated the antitrust laws by using patents it allegedly procured by fraud to restrict the plaintiff's trade abroad. In bringing its suit, plaintiff did not ask the court to declare the foreign patents invalid. Instead, Mannington argued that its

9. One commentator has noted that *Clayco* has adopted the "strict" view of the act of state doctrine favored by other courts, most notably the Second Circuit in *Hunt v. Mobil Oil*, 550 F.2d 68 (2nd Cir.), *cert. denied* 434 U.S. 984 (1977), that precludes examination of a foreign sovereign's motivations. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 357 n.190 (1986). Courts and commentators alike have criticized this interpretation of the doctrine as discouraging effective enforcement of United States regulatory policies against those who violate the law by engaging in illegal or anticompetitive conduct abroad. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied* 445 U.S. 903 (1980); *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981); Bazyler, *supra*, at 347. This court has expressed similar concerns with too sweeping an application of the doctrine. *See Curtiss-Wright*, 694 F.2d at 304 & n.5

action was concerned only with proving Congoleum's violations of United States trade regulations. *See Mannington Mills*, 595 F.2d at 1290-91.

In *Mannington Mills* this court held, through Judge Weis, that the act of state doctrine did not bar adjudication of the plaintiff's claims. The court focused on the nature of the questioned conduct -- the grant of a patent, an essentially routine act that raised no serious foreign policy concerns. *See id.* at 1294. But implicit in the opinion was an unwillingness to allow litigants to shield themselves from the consequences of illegal conduct abroad by invoking the act of state doctrine as a defense in American courts. *See id.* at 1293.

What was implicit in *Mannington Mills* became explicit in *Williams v. Curtiss-Wright*. Plaintiff Williams alleged that defendant Curtiss-Wright monopolized the international market for a certain kind of jet engine, and claimed violations of the federal antitrust laws, as well as injury caused by common-law torts. Curtiss-Wright moved to dismiss Williams' complaint on act of state grounds, arguing that the doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied Curtiss-Wright's motion. *See Curtiss-Wright*, 694 F.2d at 301-02.

On appeal, this court, again speaking through Judge Weis, affirmed. This court rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government. Judge Weis noted that a private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government. *See id.* at 304 (citing *Continental Ore v. Union Carbide & Carbon Corp.*,

370 U.S. 690 (1962)). The opinion stressed the importance of insuring that the act of state doctrine not interfere with the implementation of the policies served by antitrust and other regulatory statutes. "The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations.... " *See id.* at 304 (citations omitted). Having found that the record did not show that litigation of Williams' claims would impede the executive's conduct of foreign relations, this court held that application of the doctrine was not called for.

The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

In the instant case, the district court's dismissal was based on little more than speculation about the effect that ETC's lawsuit might have on relations between the United States and Nigeria. The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

Thus, to resolve ETC's claims on their merits, the district court would be called on simply to determine as

a factual matter whether the appellees' alleged bribery of Nigerian officials motivated the award of the contract. The only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy was the letter from Legal Adviser Sofaer.[10] That official pronouncement of State Department policy, as it relates to this litigation, reads as follows:

> In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:
>
> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions....
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination

10. Assistant United States Attorney Levy's representations at Kirkpatrick's sentencing, *supra* note 5, were not made in the course of these proceedings, were not addressed to act of state questions, and antedated the Legal Adviser's letter by nearly a year.

> that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.
>
> These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the court from adjudicating this dispute.

See Letter from Abraham D. Sofaer, Appendix to this Opinion (December 10, 1986) (emphasis in original).

In sum, the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of ETC's lawsuit.[11] We appreciate, of

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11. The Legal Adviser's letter does urge the court to exercise "caution and due regard for foreign sensibilities" at each stage of the litigation. In particular, the court is asked "to endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." Interpreting this passage as a failure on the part of the Legal Adviser to "sign off" completely on the act of state question, the district court dismissed

course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts.[12] But the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.[13] As against that assessment, defendants have not developed a factual record "showing that adjudication may hinder international relations ...." *Curtiss-Wright*, 694 F.2d at 304.

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the Legal Adviser's caveats with respect to the production of evidence as impractical and unconstitutional. *See ETC*, 659 F. Supp. at 1398.

The Legal Adviser's expressions of concern about the possible damage to foreign relations that may result from wide-ranging discovery against foreign officials should not have been interpreted as a sign of ambivalence about the act of state question. Rather, the Legal Adviser simply urged the court to exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities. This advice is far from impractical. Foreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad when compared to the European version of the fact-finding process. *See* Comment, *Antitrust Suits Involving Foreign Commerce*, 135 U. Pa. L. Rev. 1003, 1013-17 (1987). American judicial insensitivity to this foreign reaction has resulted in the enactment of "blocking" laws, *i.e.* laws that are specifically designed to block the Federal Rules' discovery provisions. *See id.* at 1016. The State Department's advice on this matter should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the executive has become familiar.

12. *See supra* note 6.

13. That respect is, in our judgment, enhanced when the Legal Adviser is one who, in his former capacity as a federal judge, has addressed act of state problems with marked sensitivity and rigor in a particularly demanding context. *See Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984).

This litigation falls squarely within the teaching of *Curtiss-Wright*. In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts. And, finally, the defendants in each case failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine. We therefore will reverse the court's grant of summary judgment, and will remand the case for further proceedings.[14]

III.

Having found that the act of state doctrine is no bar to appellant's claims, we turn to the remaining issues presented. First, ETC argues that the district court erred in dismissing the state and federal racketeering claims. Second, ETC seeks reversal of the district court's order barring the deposition testimony of defendant Carpenter, who asserted his Fifth Amendment privilege when examined about Kirkpatrick's Air Force contract bid. Third, all of the defendants challenge the district court's determination that ETC has standing to bring its antitrust and RICO claims. And, fourth, defendant DIC reiterates its contention that it is insulated from liability for any misdeeds of Kirkpatrick and Carpenter. We address these questions in turn.

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14. ETC has also argued that *Mannington Mills*' ten-factor balancing test should not result in a dismissal of the case on the basis of international comity. *See Mannington Mills*, 595 F.2d at 1297-98. Since the issue apparently was not raised below, and the record is substantially devoid of the sort of information called for by

A.

The district court dismissed ETC's state and federal RICO claims because it concluded that the amended complaint failed to allege facts establishing a pattern of racketeering activity. Noting that this court had not formulated a definition of the pattern requirement, the district court adopted a definition of pattern which would have required the appellant to allege facts establishing either (1) more than one criminal scheme undertaken by the defendants, or (2) a single, open-ended scheme. *See Environmental Tectonics v. W. S. Kirkpatrick & Co., et al.*, 659 F. Supp. 1381, 1390 (D.N.J. 1987). The district court found that ETC's amended complaint met neither prong of this test because it alleged a single scheme which was neither "continuous" nor "on-going."

The pattern requirement accepted by the district court has since been rejected by this court. In *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3rd Cir. 1987), this court held that allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, No. 87-5144 Slip Op. at 24 (March 29, 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged

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the *Mannington Mills* test, it would be inappropriate for this issue to be examined for the first time on appeal.

in the amended complaint -- mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act -- were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir. 1987). But, to focus only on the series of payments -- i.e., one bribe divided into four parts -- is to ignore the complexity of Kirkpatrick's scheme. If the appellant's allegations are true, a European conglomerate, and two American corporations -- successfully, and over a two-year period -- organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3rd Cir.

1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Bartichecк*'s specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the statute. ETC may proceed on its RICO claim, and -- assuming, as have the district court and the parties, that the pattern requirements for the New Jersey Anti-Racketeering act are substantially similar -- on its state racketeering claims as well.

B.

ETC's final ground of appeal challenges the district court's decision that the Fifth Amendment privilege against self-incrimination shielded Carpenter from responding to deposition questions the answers to which might yield evidence that Carpenter had committed crimes under Nigerian law. ETC argues that the record does not establish any significant likelihood that responding to deposition questions here would expose Carpenter to trial in the courts of Nigeria. ETC also argues that, in any event, the Fifth Amendment is not a shield against foreign prosecution.

As summarized by the court below, the evidence adduced by Carpenter to establish the risk of criminal prosecution in Nigeria was as follows:

> Prior to his deposition, Carpenter submitted an affidavit...setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual basis of the privilege. As discussed earlier

> in the opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media attention and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian contract. Akindele further warned Carpenter not to travel to Nigeria and to exercise care in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." This information, which originally came from Interpol, was relayed to Carpenter. Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated."

The magistrate reviewed this evidence in the light of the factors relevant to the risk of foreign prosecution enumerated by the Second Circuit in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2nd Cir. 1982):

> [T]he court in resolving the issue [must focus on] whether there is an existing or potential prosecution of [the witness]; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a

likelihood that his testimony given here would be disclosed to the foreign government.

The magistrate found "that, by defendant Carpenter's affidavit, there is a real fear that he might involuntarily be subject to the criminal jurisdiction of Nigeria." The district court concluded that "[t]he Magistrate's decision has not been shown to be clearly erroneous or contrary to law." *ETC*, 659 F. Supp. at 1401.

We disagree. We have no doubt that the testimony ETC sought to elicit at deposition might aid in a criminal prosecution of Carpenter by Nigeria, if such a prosecution were undertaken. However, it is not contended that Carpenter, who has already pleaded guilty to the criminal charges brought by the United States, could be extradited to Nigeria for the alleged bribes. The entire risk of prosecution in Nigeria rests, therefore, on the possibility that Carpenter would be kidnapped by Nigerian authorities; and we do not think that possibility comes close enough to being a significant likelihood to carry the day. We are prepared to assume that a real fear, substantially grounded in fact, of being kidnapped by the agents of a foreign government with a view to prosecution by that government might well justify a witness' assertion of his or her fifth amendment privilege. But the fact that Carpenter has been admonished to avoid being kidnapped does not, in our judgment, constitute substantial proof that the feared conspiracy is more than gossamer. Nothing in this record supports an inference that kidnapping foreigners not resident in Nigeria in order to bring them to trial in Nigeria is characteristic of Nigerian law enforcement personnel.

That Carpenter is sincere in his apprehension of the risk does not mean that the apprehension justifies his assertion of the privilege. "The apprehension," as the court noted in *Flanagan*, "must be a real and

reasonable one, based on objective facts as distinguished from subjective...speculation." *Flanagan*, 691 F.2d at 121. And this is because, as the Supreme Court made plain in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), rejecting the Fifth Amendment claim presented there, "the privilege protects against real dangers, not remote and speculative possibilities." In short, we think the record made by Carpenter does not constitute substantial evidence of "real dangers."[15]

As noted above, ETC further contends that the Fifth Amendment is only a domestic shield, which guards against self-incrimination in other American courts, whether state or federal,[16] but does not protect

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15. Carpenter might have met his burden under this standard if he had been officially warned by the United States Government to forgo travelling abroad in order to avoid capture by Nigerian agents seeking to bring him to Nigeria for trial. Other evidence -- *e.g.* a pending prosecution or the institution or threatened institution of extradition proceedings -- might also have supported Carpenter's assertion of the privilege.

The justifications that Carpenter advances in this case, however, amount to nothing more than speculation about Nigeria's intentions. First, the warnings by Benson Akindele, who does not appear to be a Nigerian official, do not, standing alone, provide a basis for Carpenter's fear of prosecution. And the somewhat ambiguous representation of Assistant United States Attorney Steven Levy with respect to Nigeria's "vital interest" in the American prosecution of Carpenter, *supra* note 5, falls short of suggesting that Nigeria was preparing to prosecute Carpenter.

Second, what Carpenter identifies as a warning from the United States is actually something more remote. The record suggests that the Nigerian government, if interested at all in Carpenter, sought only to question him about others rather than prosecute him. Moreover, Carpenter himself was not troubled enough by the warning to stay in the United States: he later travelled to the Bahamas. To justify his invocation of the privilege, Carpenter would have had to come forward with a good deal more than he presented to the magistrate.

16. *See Murphy v. Waterfront Commission*, 378 U.S. 52 (1962).

one from American court orders which would compel testimony that might threaten incrimination in the courts of a foreign sovereign. That issue, which the Supreme Court found unnecessary to resolve in *Zicarelli, supra*, has generated a contrariety of views in the lower courts. The Tenth Circuit, *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970), and the Fourth Circuit, *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986), have rejected the contention that the Fifth Amendment is extra-territorial in scope. The chief authority in support of an extra-territorial application is Judge Newman's opinion in *In re Cardassi*, 351 F. Supp. 1080 (D.Conn. 1972). *Cardassi* has been subscribed to by Judge Hufstedler, concurring in *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1169 (9th Cir. 1979), and has been followed by two district courts in this circuit. *See United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981); *United States v. Kowalchuk*, No. 77-118 (E.D.Pa. 1978).[17]

Because we have determined that the present record does not, in any event, present a substantial risk that Carpenter would be subject to prosecution in the courts of Nigeria, we find it unnecessary to resolve the important constitutional question as to the reach of the Fifth Amendment that would otherwise be presented.

C.

On cross-appeal, defendants raise two objections to rulings by the district court. The first contention, joined in by all of the defendants, is that the district court erred in concluding that ETC had standing to

17. The question has been discussed, but not resolved, by the District of Columbia Circuit in *In re Sealed Case*, 825 F.2d 494, 497 (D.C.Cir. 1987), and by the Second Circuit in *Flanagan*, 691 F.2d at 124.

press its antitrust, RICO, and New Jersey Anti-Racketeering Act claims. This argument is premised on what the defendants perceive as factual deficiencies in ETC's amended complaint. In their view, ETC has not pleaded any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the Air Force contract. The defendants also argue that ETC has pleaded no facts that would establish the payment of illegal commissions from the defendants to Nigerian government officials. The district court concluded that the amended complaint's allegations were sufficient to confer standing on ETC, and we agree with that assessment.

As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).[18] Congress enacted section 2(c), the Act's brokerage provision, primarily to curb one particular abuse by large chain store buyers, namely the use of "dummy" brokerage fees as a means of securing price rebates. *See Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985). The section has also been

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18. 15 U.S.C. § 13(c) states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

applied, however, in cases that involve commercial bribery. *See id.* at 371; *see also Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied* 383 U.S. 936 (1966)(company which bribed state purchasing agent liable to competitor for state contract under 2(c)).

Although this court has concluded that as a general matter commercial bribery is actionable under 2(c), it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa. *See Seaboard Supply*, 770 F.2d at 372. The amended complaint alleges that Kirkpatrick paid the illegal commissions to the Akindele-controlled corporations, from which they were distributed to unnamed Nigerian officials. Though the allegation is not a detailed one, it clearly charges that illegal payments were passed from a seller to a buyer -- a violation of 2(c).

Not every plaintiff who alleges an actionable claim under the antitrust laws has standing, however, to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged. *See Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours and Co.*, 826 F.2d 1235, 1240 (3rd Cir. 1987). A private plaintiff does not have to prove price discrimination to recover for a violation of 2(c), *Seaboard Supply*, 770 F.2d at 371 n.3, but the plaintiff must still meet the standing requirements to proceed. *See Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270-72 (5th Cir. 1979).

Because of the standing doctrine's malleability, it would be difficult to define with precision the contours of the class of potential plaintiffs who have standing to

assert 2(c) claims. Indeed, this court's case-by-case approach to the standing requirement argues against such an attempt. *See Alberta Gas Chemicals*, 826 F.2d at 1239-41. We need not do so in this case, moreover, because it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber. *See Cool Attic*, 587 F.2d at 271-72; *Municipality of Anchorage v. Hitachi Cable*, 547 F. Supp. 633, 640 (D. Alaska 1982); *Computer Statistics v. Blair*, 418 F. Supp. 1339, 1348 (S.D. Tex. 1976); III E. Kintner and J. Bauer, *Federal Antitrust Law* § 26.12, at 529-30 (1982).

We agree with the district court that ETC's amended complaint alleged sufficient facts to establish the kind of injury that would confer standing to bring a claim against the defendants. Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid. As the district court noted, short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from defendants' alleged violation of section 2(c).

The question of ETC's standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, ETC need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. *See Town of Kearny*, 829 F.2d at 1268 (quoting *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987)). ETC's allegations in the amended complaint of injury from the bribery scheme -- a scheme that the amended complaint charges with sufficient factual specificity -- meet this standard. We also assume, as did the district

court and the parties, that the New Jersey Anti-Racketeering Act's requirements are essentially the same as the federal standards.

D.

Finally, defendant DIC, one of Kirkpatrick's corporate parents, contends that the it is entirely immune from liability. ETC claims that liability for the alleged wrongful acts of the Kirkpatrick group can be imputed to DIC on either of two theories: by piercing the defendant's corporate veil, *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986), or by finding that Carpenter acted as DIC's agent in carrying out the bribery scheme, *Japan Petroleum Co. v. Ashland Oil*, 456 F. Supp. 831 (D. Del. 1978). The district court found that the amended complaint minimally alleged "a relationship among [DIC], IDC, Carpenter, and Kirkpatrick sufficient to support the potential imposition of liability upon [DIC] or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick." *ETC*, 659 F. Supp. at 1388. The court also concluded that ETC and the defendants should have the opportunity to proceed with discovery so that the facts defining the relationship of DIC, IDC, Carpenter and Kirkpatrick may be fully developed. *See id.* at 1389. We find no reason to question such a course, which should produce a record on the basis of which the question of DIC's liability can be properly determined. *See Craig v. Lake Asbestos of Quebec, Ltd.*, No. 87-1254 (3rd Cir. March 31, 1988).

Conclusion

We therefore will reverse the district court on its act of state decision, its dismissal of plaintiff's RICO and Anti-Racketeering Act claims, and its affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. As to the

other issues, we will affirm the district court. We will remand this case for proceedings consistent with this opinion.

APPENDIX

United States Department of State
The Legal Adviser
Washington, D.C. 20520
December 10, 1986

The Honorable
Alfred J. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

Re: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co. Inc., et al.*, Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions. . . .
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

Abraham D. Sofaer

cc: Alan A. Turner, Esq.
Thomas H. Sear, Esq.
Lawrence S. Horn, Esq.
Theodore V. Well, Esq.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,
Plaintiff,

v.

W.S. KIRKPATRICK & CO., INC., et al.,
Defendants.

Civ. A. No. 86-796.

United States District Court,
D. New Jersey.

May 1, 1987.

Corporation engaged in manufacture and sale of aircraft equipment and facilities brought action against corporate competitors and individuals, seeking damages in connection with award of contract with government of Nigeria, which was allegedly procured in violation of antitrust and racketeering laws. Defendants moved to dismiss for failure to state claim upon which relief could be granted. The District Court, Lechner, J., held that: (1) allegations that competitors engaged in mail and wire fraud and committed bribery were insufficient to establish pattern of racketeering activity, and (2) act of state doctrine precluded action.

Dismissed.

Thomas B. Rutter, and Alan Turner, Rutter, Turner & Stein, Haddonfield, N.J., for plaintiffs.

Thomas H. Sear, and Rhonda D. Orin, Spengler, Carlson, Gubar, Brodsky & Frischling, New York City, and Lawrence S. Horn, Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, Newark, N.J., for defendant Kirkpatrick and DIC Holding.

Robert L. Krakower, Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, N.J., for defendant Harry Carpenter.

Robert W. Delventhal, Crummy, DelDeo, Dolan, Griffinger & Vecchione, Newark, N.J., for defendants Emro and Ruppert.

Jerome L. Merin, Asst. U.S. Atty., Office of the U.S. Atty., Newark, N.J., for Dept. of Justice.

Dominic F. Amorosa, Short Hills, N.J., for defendant John M. Krankel.

John J. Barry, Clapp & Eisenberg, Newark, N.J., for defendant R.H. Edwards.

OPINION

LECHNER, District Judge.

This action was brought by Environmental Tectonics Corporation, International ("ETC") against W.S. Kirkpatrick, Inc. and certain other corporations and individuals. ETC seeks damages in connection with the award of a contract which contract ETC alleges was procured in violation of antitrust and racketeering laws. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be granted. ETC has filed an amended complaint more specifically alleging certain aspects of the original complaint while adding and dropping certain defendants.

The motions were filed by defendants pursuant to Federal Rule of Civil Procedure 12(b)(6). With the exception of the act of state

portion of these motions, it is assumed for the sole purpose of the disposition of these motions the facts alleged in the amended complaint are true and all reasonable inferences have been drawn in favor of ETC. *See D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir.1984). Accordingly, the description of the facts concerning these motions is based in large part upon ETC's allegations. With regard to the act of state argument, additional information has been requested from counsel and, as well, from the United States Department of State [1] which information has been considered together with the exhibits attached to ETC's brief in opposition. Therefore, this aspect of the defendants' motions will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; all parties have been so informed and have been given an opportunity to respond. This opinion also addresses plaintiff's appeal of three orders entered by Magistrate Hedges.

I. *Procedural History*

ETC filed a three count complaint naming the following defendants: W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick")(erroneously named as W.S. Kirkpatrick, Inc.); Development International Corporation ("DIC"); DIC (Holding) Inc. ("Holding"); IDC International S.A. Luxembourg; Harry G. Carpenter ("Carpenter"); and Benson "Tunde" Akindele ("Akindele"). The complaint alleged that defendants' tactics in obtaining a contract with the government of Nigeria violated sections of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962, *et seq.*), the New Jersey Anti-Racketeering Act (§ 2c:41-2, *et seq.*) and the Robinson-Patman Act (15 U.S.C. § 13(c) *et seq.*)

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[1] The Department of State was notified by telephone of this matter on September 10, 1986 (a copy of the transcript of the telephone call was made available to all parties). In addition, a copy of all relevant documents was forwarded to the Department of State on September 12, 1986. Because of numerous internal problems, the Department of State repeatedly requested extensions of the time within which to respond to the issues presented by the act of state portion of the motions. On December 10, 1986 a response of the same date was received from the Department of State.

ETC filed an amended complaint which added new counts and more specifically alleged certain aspects of its original complaint. The amended complaint added the following defendants: John M. Krankel; W.S. Kirkpatrick & Co. International ("Kirkpatrick International"); International Development Corporation, S.A. ("IDC"); Emro Engineering Co., Inc. ("Emro"); Robert W. Ruppert; Ross E. Saxon; and R.H. Edwards. DIC was not named in the amended complaint. The amended complaint recited the original counts and added a defamation count against Emro and Ruppert, as well as allegations of interference with prospective contract relations against all the defendants.[2]

Kirkpatrick moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Holding, DIC, Carpenter, Krankel, Kirkpatrick International, and Edwards joined the motion brought by Kirkpatrick. These defendants are referred to herein collectively as the "Moving Defendants".[3]

[1] The motions collectively raise four distinct issues: first, whether ETC's pleadings allege facts establishing that Carpenter and Kirkpatrick are sufficiently related to Kirkpatrick's corporate parents to warrant the inclusion of the corporate parents as defendants to this action; second, whether ETC's pleadings allege facts showing ETC suffered injury as a result of defendants' alleged antitrust and RICO violations; third, whether ETC's pleadings allege facts to establish a "pattern of racketeering activity," as required by the federal and state racketeering laws; and fourth, whether ETC's claims are barred by the act of state doctrine.[4]

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[2] This case and the motions filed were reassigned to this Court by Order, dated July 16, 1986.

[3] Although the Moving Defendants' motions are brought against the sufficiency of the pleadings as set forth in the original complaint, upon review of the record the issues raised by the motions are properly raised against the sufficiency of the pleadings as set forth in the amended complaint. I shall consider the motions accordingly.

[4] The results of the third and fourth issues, the RICO and the act of state portions of the motions, are applicable to those defendants who have not so moved or have not yet been served with the complaint or not yet answered the complaint.

II. *Facts*

In 1954, Carpenter became an employee of Kirkpatrick, a New Jersey corporation, which is involved in the business of selling and brokering aircraft equipment and facilities. At some point prior to 1978, Carpenter became a major shareholder, Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick.

In 1978, Carpenter sold all of his stock and equity interest in Kirkpatrick to Holding. Also in 1978, pursuant to the terms of a consulting and employment agreement, Carpenter agreed to remain as Chairman of the Board and Chief Executive Officer of Kirkpatrick for a period of five years. The stock of Holding was, at all times relevant to this motion, owned by IDC, a Luxembourg corporation.

ETC is a Delaware corporation having its principal place of business in Pennsylvania and is engaged in the business of manufacturing and selling aircraft equipment and facilities.

At some point during the period 1980-1981, both ETC and Kirkpatrick or Kirkpatrick International sought to procure a contract with the Republic of Nigeria to construct an aeromedical facility at Kaduna Air Force Base in Nigeria and to provide equipment for that facility (the "Nigerian Contract"). In an effort to obtain the Nigerian Contract, Carpenter negotiated an agreement with Akindele, A Nigerian citizen (the "Akindele Agreement"), whereby Akindele was to act on behalf of certain defendants in seeking to procure the Nigerian Contract. The Akindele Agreement provided that certain defendants would pay a "commission" to two Panamanian entities controlled by Akindele if the Nigerian Contract was procured for defendants. The commission was to equal 20% of the Nigerian Contract price; a majority of the commission was to be paid, in turn, as bribes to officials of the Nigerian Government for the award of the Nigerian Contract. During this same period, ETC was negotiating with Nigerian officials to procure the Nigerian Contract, and at some point submitted a bid for the Nigerian Contract.

On March 19, 1982 the Nigerian Contract was awarded to Kirkpatrick International, a wholly-owned subsidiary of Kirkpatrick. Payments on the Nigerian Contract by the Nigerian Government began in September, 1982 and shortly thereafter defendants' payments of the agreed upon commissions to the two Panamanian entities were effected. The alleged commissions were made on four separate occasions, September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983, and totaled approximately $2 million. ETC alleges Kirkpatrick International obtained the Nigerian Contract as a result of the commissions paid or promised as bribes to Nigerian officials who otherwise would have awarded the Nigerian Contract to ETC.

Carpenter was prosecuted for a violation of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.* (Supp. V 1981) ("FCPA").[5] On October 2, 1985 the United States Attorney for the District of New Jersey filed in the Carpenter matter an offer of proof which was signed by Carpenter. This offer of proof establishes certain facts which include the Akindele Agreements and the payment of the commission to the two Panamanian entities in connection with the Nigerian Contract. However, the offer of proof does not establish the payment or promise of bribes to Nigerian government officials. Kirkpatrick was also prosecuted for violations of FCPA. Both Carpenter and Kirkpatrick pled guilty to violation of FCPA.

On January 6, 1986 at the sentencing of Kirkpatrick, Assistant United States Attorney Steven Levy made the following representations to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. ... I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political

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[5] This document and a transcript of a sentencing of Kirkpatrick for violation of FCPA were submitted by ETC in opposition to defendants' motions.

> impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,....

(Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22) (hereinafter "Levy Representations".)

The views of the United States Department of State, dated December 10, 1986 (the "State Department Position") indicate two positions relevant to this matter:

> If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the [Nigerian] contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.
>
> . . . . .
>
> Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may

> seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

State Department Position, at 2-3 (attached as Appendix A).

The government of "Nigeria was informed not later than the end of November, 1985 [of the bribery charges with regard to the Nigerian Contract] as a result of the publicity surrounding the admissions of guilt [to violations of FCPA] and sentences with respect thereto on behalf of Kirkpatrick and Carpenter...." See submission, dated August 26, 1986, of counsel to plaintiff.

On July 31, 1986 counsel for ETC forwarded a letter to the Nigerian Embassy in Washington, D.C. to request a declaration from the Republic of Nigeria "to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America." The stated purpose of this requested declaration was to nullify the defendants' "act of state" argument to dismiss ETC's complaint.

To date, it appears the Republic of Nigeria has not responded to either the publicity surrounding the FCPA prosecutions or the July 31 letter not has it taken any action with regard to the allegations surrounding the Nigerian Contract.

III. *Discussion*

A. *Inclusion of Holding and IDC*

In its complaint, ETC appears to present two theories supporting the imputation of liability to Holding and IDC for the alleged wrongful acts of Kirkpatrick and Carpenter: first, that Carpenter acted as án agent of Holding and IDC when he negotiated the Akindele Agreement; and second, that Kirkpatrick

was a "mere instrumentality" of Holding and IDC. Holding and IDC maintain ETC has failed to allege facts showing Holding and IDC are sufficiently related to, or responsible for, Kirkpatrick and Carpenter to support the imposition of liability on Holding and IDC for actions taken by Kirkpatrick and Carpenter. In addition, Holding and IDC maintain ETC has failed to allege facts establishing Carpenter acted as an agent, servant or employee of Holding and IDC during negotiations in connection with the Nigerian Contract. In support of their position, Holding and IDC assert that ETC's pleadings on these issues establish nothing more than Holding and IDC own Kirkpatrick and that Carpenter entered into an employment contract with Kirkpatrick and/or Holding.

[2] Whether an agency relationship exists between a parent corporation and employees a parent corporation and employees or officers of its subsidiary or whether a subsidiary is an instrumentality of the parent is normally a question of fact and degree. The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary. See *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F.Supp. 831, 840-41 (D.Del.1978). *Accord*, *Hoffman v. United Telecommunications, Inc.*, 575 F.Supp. 1463, 1478 (D.Kansas 1983).

[3] In addressing the problem of relationships between parent and subsidiary corporations, courts have cited the criteria set forth in *Fish v. East*, 114 F.2d 177, 191 (10th Cir.1940), to aid in determining whether a subsidiary is such an instrumentality of the parent corporation that treating the two as one is warranted. *See, e.g., Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir.1963); *Hoffman*, 575 F.Supp. at 1478; *Japan Petroleum Co., Ltd.*, 456 F.Supp. at 841. The factors to be examined include ownership of the subsidiary's stock, identity of officers and directors of the corporations, financial arrangements of the corporations, responsibility over day-to-day operations of the subsidiary and payment of the subsidiary's salaries and expenses. These criteria aid the Court in determining whether:

> from all the facts and circumstances it is apparent that the relationship between the parent and subsidiary is so intimate, the parents control over the subsidiary is so dominating, and

> the business and assets of the two so mingled, that recognition of the distinct entity would result in an injustice to third-party persons....

Hoffman, 575 F.Supp. at 1478 (quoting from two other cases).

[4] ETC's amended complaint alleges (1) that in 1978 Carpenter entered into an employment contract with Kirkpatrick and/or Holding; (2) that in 1978 Carpenter sold all of his "major" shareholdings and equity interest in Kirkpatrick to Holding; and (3) that various financial aspects of the relationships among the corporate defendants indicate they are engaged, to some extent, in a single economic enterprise.[6] Although ETC's pleadings are not exhaustive, it cannot be said, as a matter of law, the pleadings fail to allege a relationship among Holding, IDC, Carpenter and Kirkpatrick sufficient to support of the potential imposition of liability upon Holding or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick.

As Holding and IDC point out in their brief, "whether an agency relationship has been created is a factual question." (Memorandum of DIC and Holding at 14.) ETC relies on *Melikian v. Corradetti*, 791 F.2d 274, 282 (3d Cir.1986) which, although not directly on point, provides some guidance: "[t]he issue of whether the corporate veil can be pierced is primarily a question of fact. Plaintiffs have alleged sufficient facts to state a claim and should be permitted to proceed with discovery to further develop the factual record." Accordingly, the ETC pleadings are adequate in this regard.

B. *ETC's Standing*

[5] The Moving Defendants argued that under the facts pleaded in ETC's complaint, ETC lacks standing to bring its antitrust

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[6] Specifically, the amended complaint alleges that Holding is the "manager" of Kirkpatrick and that Holding has authority over financial aspects of Kirkpatrick's operations, including payments made in connection with the Nigerian Contract.

and RICO claims against them. The Moving Defendants contend ETC's pleadings fail to establish the requisite injury because there are insufficient facts pleaded to show ETC would have won the Nigerian Contract but for the improper actions of the Moving Defendants. Although the original complaint may have been insufficient, the amended complaint pleads ETC's injury sufficiently to survive these motions to dismiss. The amended complaint alleges ETC was competing with the Moving Defendants for the Nigerian Contract and "upon information and belief", but for the alleged improprieties of the Moving Defendants, ETC would have obtained the Nigerian Contract. (Amended Complaint ¶ 40.) Absent unequivocal evidence that ETC was next in line to obtain the Nigerian Contract, ETC could not have pleaded its injury with more particularity. Facts may surface showing these allegations are untrue; for present purposes, however, ETC has alleged injury as a result of the actions of the Moving Defendants and has standing to bring its claims.

C. *Pattern Requirement of RICO*

RICO prohibits the use or investment of funds in an enterprise involved in interstate commerce if the funds are "derived, directly or indirectly, from a pattern of racketeering activity . . . ." 28 U.S.C. § 1962(a). RICO defines a pattern of racketeering activity as requiring "at least two acts of racketeering activity . . . ." 28 U.S.C. § 1961(5).

ETC contends the four separate payments of the commissions and the further payment of those commissions as bribes constitute separate acts of racketeering activity to support a finding of the requisite pattern. The Moving Defendants argue RICO's "pattern" mandate requires a showing of separate criminal episodes.

Prior to the Supreme Court's decision in *Sedima, S.P.R.L. v. Imprex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), courts were divided over the proper construction and application of RICO's pattern of racketeering activity requirement. Some courts held multiple criminal acts in furtherance of a single criminal scheme constituted the requisite pattern. *See, e.g.*,

United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir.1978) (each mailing in furtherance of scheme to defraud constitutes a separate act of racketeering, thereby establishing a pattern). Other cases held multiple criminal episodes were necessary to establish the pattern of racketeering activity requirement. *See, e.g., Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6, 12-13 (W.D.Pa.1981) (series of payments in single bribery scheme insufficient to establish RICO pattern).

The Supreme Court's *Sedima* decision offers some guidance in resolving the pattern controversy. Quoting from the Senate Report on RICO, the Court stated: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective . . . . S.Rep. No. 91-617 p. 158 (1969)." *Sedima*, 105 S.Ct. at 3285 n. 14. The Court's opinion then referred to another section of RICO providing that " 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act." *Id.*

Many courts have relied on footnote 14 of the *Sedima* opinion in declining to find a pattern of racketeering activity where the alleged acts were committed in furtherance of a single fraudulent scheme posing no threat of continuing activity. *See, e.g. Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-57 (8th Cir.1986) (several acts of mail and wire fraud in pursuit of single isolated conversion or theft claim fail to establish requisite pattern); *Emmanouilides v. Buckthorn, Ltd.*, 642 F.Supp. 964, 966 (S.D.N.Y.1986) (several fraudulent mail and wire communications not a pattern; "rather, they are components of a single activity, the alleged vessel fraud"); *Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F.Supp. 1532, 1534 (D.Mass.1986) ("In applying civil RICO, therefore, it is essential to identify threats of continuing criminal activity, as opposed to isolated criminal events."); *Temporaries, Inc. v. Maryland Nat'l Bank*, 638 F.Supp. 118, 124 (D.Md.1986) ("Without an open-ended series of activities which comprise a continuing scheme, more

than one scheme should be required to establish a 'pattern' of racketeering activity")' *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 8 (D.N.J. January 9, 1986) [available on Westlaw, DCTU database] ("the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstance, is completely undimensional. It suggests no expansion, no ongoing design, no continuity, such as was the target of Congress in RICO"); *Allington v. Carpenter*, 619 F.Supp. 474 (C.D.Cal.1985) (three acts of wire fraud with single victim and scheme insufficient to establish pattern); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828 (N.D.Ill.1985) (mailing of subcontract and several kickback payments in connection with single kickback scheme insufficient to establish pattern).

Some of these courts have argued the Congressional intent behind RICO's pattern requirement was to reach only multiple criminal episodes, such an interpretation being "consistent with the connotation of multiple events implicit in the term 'pattern.' " *Carpenter*, 619 F.Supp. at 478. *See also Fulmer*, 785 F.2d at 255-57; *Inryco*, 615 F.Supp. at 831. Other courts have asserted a RICO pattern may be established by showing the existence of either (1) more than one unlawful scheme, or (2) "an open-ended continuous scheme which contains a multiplicity of predicate acts." *Temporaries, Inc.*, 638 F.Supp. at 123. *See also Eastern Corporate Federal Credit Union*, 639 F.Supp. at 1535-36; *Kredietbank*, slip. op. at 7-8.

[6] Identification of such an "open-ended continuous scheme" requires an assessment of various factors indicative of the scheme's "continuity." Such factors include "the length of the scheme, the number of predicate acts and the number of victims of such acts, and the likelihood that the scheme would continue indefinitely." *Temporaries, Inc.*, 638 F.Supp. at 123, n. 1A. *See also, United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir.1986) ("when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise [RICO pattern exists]").

[7] The second approach for dealing with RICO's pattern requirement offers greater flexibility and appears to be more in line with the Congressional intent behind enactment of RICO. Because it is possible a single unlawful "scheme" could involve sufficient instances of "racketeering activity" amounting to a "pattern" of activity warranting liability under RICO, a blanket rule that "pattern" requires more than one scheme is unsatisfactory. An approach looking for either (1) more than one scheme, or (2) an open-ended scheme, "would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy – those which evidence a true pattern of racketeering activity." *Temporaries, Inc.*, 638 F.Supp. at 124.[7]

[8] ETC claims certain defendants engaged in mail and wire fraud and committed bribery in making the four separate payments to the Panamanian entities for payment to Nigerian officials. These four payments, however, were only in furtherance of the single alleged bribery scheme used to obtain the Nigerian Contract, a scheme which cannot be said to be ongoing or otherwise comprising a "multiplicity of predicate acts." As the cases cited above establish, such an allegation fails, as a matter of law, to set forth a pattern of racketeering activity as required by RICO.

[9] The amended complaint alleges, "upon information and belief ", certain defendants have engaged in other improper actions similar to those alleged to have occurred in connection with the Nigerian Contract. (Amended Complaint ¶ 57.) However, the allegation is devoid of factual support and without some such support cannot establish a RICO "pattern" of racketeering activities. RICO is, in essence, a fraud statute, and as Federal Rule

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[7] Some courts since the *Sedima* decision have adopted, or favorably referred to, a broad interpretation of the RICO pattern. *See, e.g. R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir.1985); *Systems Research, Inc. v. Random, Inc.*, 614 F.Supp. 494 (N.D.Ill.1985). However, these cases are not controlling, and, in light of the logical reasoning of the many cases cited above, they are ultimately unpersuasive.

of Civil Procedure 9(b) provides, the facts giving rise to allegations of fraud must be pleaded with some degree of particularity. To hold otherwise would subvert the Congressional intent behind enactment of RICO; every fraud plaintiff could assert a RICO claim simply by pleading, upon information and belief, the existence of another scheme similar to the one truly at issue.

The inherent similarity of a common law fraud action and a federal RICO action was implicitly recognized by the Third Circuit in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). In that case, the Court reversed a district court dismissal of a RICO complaint. The plaintiff in the case claimed to have been defrauded by the defendant over a twenty-one month period in connection with the sale of some 700 pieces of industrial equipment. Plaintiff claimed defendant had made numerous misrepresentations and omissions in connection with the sale of the equipment, and that such conduct established a pattern of racketeering activity as required by RICO. The district court dismissed the RICO claim because "the complaint failed to set forth 'with even minimal particularity the details of the alleged fraud or misrepresentation.' " *Id.* at 791. The Third Circuit reversed, stating:

> The complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation. In sum, we conclude that [plaintiff] has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9(b).

Id., (footnote omitted). By contrast, the allegation in paragraph 57 of the amended complaint in this action cannot be said to "adequately describe the nature and subject" of related racketeering activities on the party of the defendants.

[10] ETC has had an opportunity to amend its pleadings so as to make a prima facie showing of the existence of a RICO

pattern. Because ETC has failed to demonstrate the defendants or certain of them have engaged in a pattern of racketeering activity, the RICO claims must be dismissed.[8]

D. *Act of State*

In their Reply Memorandum, the Moving Defendants argue the act of state doctrine bars judicial determination of ETC's claims. Specifically, the Moving Defendants contend that in order to prove violations of the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act or any of these statutes, ETC must establish officials of the Government of Nigeria were paid or knew they would be paid bribes for awarding the Nigerian Contract to Kirkpatrick, and that but for the payment of the bribes, or promise of payment, ETC would have been awarded the Nigerian Contract. The Moving Defendants argue such proof requires a judicial investigation into acts of the Government of Nigeria or would interfere with the conduct of foreign policy by the Executive Branch of the federal government, either of which is barred by the act of state doctrine.

The act of state doctrine has been defined as one of judicial abstention from an inquiry into the validity of an act by a foreign government within the scope of its sovereignty. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir.1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979); *Timberland Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir.1976), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985). Over the years courts have cited several theoretical foundations for the act of state doctrine. In an early application,

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[8] Since ETC concedes the provisions of the New Jersey Anti-Racketeering Act are to be interpreted in the same way their RICO counterpart provisions are interpreted (Brief of ETC in Opposition to Motions to Dismiss at 16), the New Jersey Anti-Racketeering claims must also be dismissed for failure to set forth the requisite "pattern of racketeering activity."

the Supreme Court explained the doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This language reflects the Court's deference to the inherent nature of sovereign authority and principles of international law upon which the doctrine was traditionally applied. The Third Circuit similarly opined that an act within the sovereign power of a foreign state or by its authorized agent within the scope and authority of the office cannot be questioned or made the subject of proceedings in our courts. *Mannington Mills*, 595 F.2d at 1292.

"The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983). It is now also recognized the foundation of the act of state doctrine is rooted in this principle – the separation of powers among the several branches of government. *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 937-38; *Curtiss-Wright*, 694 F.2d at 303. The separation of powers rationale is illustrated by the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, *supra*. Applying the act of state doctrine, the Court focused on protecting the basic relationships among branches of government in a system of separation of powers, and not hindering the executive's conduct of foreign policy by judicial review of foreign acts. *Id.*, at 423, 84 S.Ct. at 937-38.

The act of state doctrine has also been interpreted through "notions of comity and a conflict of laws theory that foreign law

is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction." *Mannington Mills*, 595 F.2d at 1292, *citing*, Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum.L.Rev. 1247, 1255 & n. 36 (1977). Thus, the "act of state" is deemed valid under the law of the land where it occurred and is applied as the law of the forum.

[11, 12] Keeping in mind the multi-faceted reasoning offered to support the act of state doctrine, a keystone in its application is the avoidance of "passing on the validity" of acts of foreign governments and the avoidance of conduct, which if effected, "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 938. Therefore, if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir.1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). This has been held to be equally true of judicial inquiries which would impugn or question the nobility of a foreign nation's motivations. *Timberlane*, 549 F.2d at 607.

[13] The act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the affect upon the parties, and the affect upon the internal affairs of the foreign sovereign and the foreign policy of this country. *See* Restatement (2d) of Foreign Relations Law of the United States § 41, Comment d.

[14] In order for ETC to prevail on its claims under the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act, it must be demonstrated the defendants or certain of them intended to wrongfully influence the decision to

award the Nigerian Contract by payment of a bribe,[9] that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that "but for" the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract. Cf. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1960); *Clayco Petroleum*, 712 F.2d at 407; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76 (2d Cir.1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *Salerno v. American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir.1970), *cert. denied*, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971). Resolution of these critical issues necessarily requires judicial inquiry into the acts of the Government of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country. *See* Levy Representations and State Department Position. Cases interpreting the act of state doctrine suggest this is the type of situation which precludes judicial inquiry.

Review of other decisions on this point begins with *Clayco Petroleum*, a case involving a strikingly similar factual situation. In *Clayco*, an oil company sued one of its competitors under the Robinson-Patman Act and other antitrust laws alleging its competitor had made secret payments to an official of Umm Al Qaywayn[10] in order to obtain an offshore oil concession. The trial court granted defendant's motion to dismiss on the ground the action was precluded by the act of state doctrine.

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[9] Decree number 38, dated November 22, 1975, of the Federal Military Government of the Republic of Nigeria lists certain prohibited corrupt practices together with the punishment for such corruption. Included within this statute is a prohibition of an individual in the employ of the government receiving or soliciting money for the showing of a favor such as the award of a contract. Decree number 38, Part I.

[10] The *Clayco Petroleum* court noted the government of Umm Al Qaywayn is a foreign sovereign for purposes of the act of state doctrine. *Clayco Petroleum*, 712 F.2d at 405 n. 1.

The Ninth Circuit found the actions complained of to be within the purview of the act of state doctrine because the sovereign activity effectuated "public" rather than private interests.[11] *Clayco Petroleum*, 712 F.2d at 406. In making the public versus private interest distinction, the court noted "[t]his case differs from those relied upon by [plaintiff], in which sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws." *Id.*

The actions which form the basis of ETC's complaint are analogous to those the *Clayco* court found to effect a public interest. Specifically the awarding of the Nigerian Contract by the Ministry of Defense is a decision which may only be made by the Government of Nigeria, its officials or representatives. Similarly, the offshore oil concession in *Clayco* was granted by the Government of Umm Al Qaywayn, its officials (the Petroleum Minister), or its representatives.

ETC's characterization of the act in question, as non-public or commercial, is unfounded. Whether it is the purpose or the nature of the act which determines commercial versus sovereign status, the award of the Nigerian Contract by the Government of Nigeria is a sovereign act. For purposes of applying the act of state doctrine to the present facts, the distinctions between the grant of an oil lease and the award of a military contract are not persuasive.

[15] Although ETC has suggested it is not in fact complaining of the actions of the Nigerian Government, its officials or representatives, and does not characterize the Government of the Republic of Nigeria or any of its agents as "co-conspirators", an indispensible ingredient of ETC's cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate

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[11] The distinction between situations in which a government acts in a commercial rather than a public capacity, the "commercial exception" has not been accepted by a majority of the Supreme Court. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706, 96 S.Ct. 1854, 1861-1867, 48 L.Ed.2d 301 (1976) (White, J., joined by three other Justices).

Nigerian law. Liability in this case cannot be attributed to any defendant unless ETC can prove the tendering and payment of the bribe to the appropriate Nigerian officials or at least, as ETC has suggested, the anticipation of such payment and reliance upon such anticipation by the appropriate Nigerian officials and thus the violation of Nigerian law by these government officials. The same considerations are relevant where the acts of a foreign sovereign are questioned directly or collaterally in litigation between private parties. *See Frazier v. Foreign Bondholders Protective Council*, 283 A.D. 44, 125 N.Y.S.2d 900, 903 (1953) ("immunity of a foreign sovereign, in all its implications, is not restricted to warding off only those assaults aimed directly at that sovereign as a party proper.").

The *Clayco* court followed *Occidental Petroleum Corp. v. Buttes Gas & Oil*, 331 F.Supp. 92 (C.D. Cal.1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). In *Occidental* plaintiff alleged the foreign sovereign issued a fraudulent territorial decree to enable the defendants, in lieu of plaintiff, to export oil and gas in the area covered by the decree. *Occidental Petroleum*, 331 F.Supp. at 95. While noting *Occidental* involved a territorial decree not present in *Clayco*, the Ninth Circuit noted the underlying dispute in both cases concerned the decision by a foreign government authorizing the exploitation of an important natural resource. The Ninth Circuit noted "it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum*, 712 F.2d at 407. Accordingly, it is not unrealistic to anticipate judicial scrutiny of the sovereign decisions of the Republic of Nigeria in allocating and awarding contracts with regard to military bases would, if not embarrass the political branches of our government, tend to make the conduct of our foreign policy with Republic of Nigeria more difficult and would require an exploration of the motive and intent of certain Nigerian governmental officials.

In determining whether to apply the act of state doctrine to this situation, ETC contends the court may inquire as to the

motivation, rather than the validity, of the questioned activities. In support of this proposition, plaintiff cites *Williams v. Curtiss-Wright Corp.*, *supra*, the Third Circuit's most recent decision in this area. The facts in *Curtiss-Wright*, however, are distinguishable and do not preclude application of the doctrine in this case.

The parties in *Curtiss-Wright* were competitors in the sale of used jet engines, parts and accessories to foreign governments. Plaintiff charged defendant with antitrust and other related state law violations. Specifically, plaintiff alleged defendant monopolized the market and engaged in the common law torts of disparagement, unfair competition, and interference with prospective economic advantage, all of which prevented plaintiff from competing in the worldwide market of reconditioned parts for aircraft engines. *Curtiss-Wright*, 694 F.2d at 301. The complaint regarded the foreign governments, not as participants in the wrongdoing against plaintiff, but as co-victims of the alleged antitrust activity of plaintiff corporation. Accordingly, the thrust of plaintiff's challenges were the anti-competitive effects of the Curtiss-Wright activities and not the validity or motivation of the conduct of foreign governments. Resolution of plaintiff's claims did not require inquiry into the motivation of foreign governments. *Id.* at 303-304.

In contrast to the allegations of the complaint in *Curtiss-Wright*, the amended complaint filed by ETC alleges by necessary implication the involvement by high Nigerian Government officials in the corrupt practices and requires the motivation of these government officials, if not the government as an entity, be examined in order for ETC to prevail on its claims. ETC alleges Akindele acted as the local agent in Nigeria for certain of the defendants in order to secure the Nigerian Contract. As a result of Akindele's efforts the Nigerian Contract was negotiated at a rate which was allegedly twenty percent higher than would be expected in order to provide defendants with the capital to pay the commissions/bribes. In substance, the negotiations and consequent award of the Nigerian Contract, as alleged in the amended complaint, were the result of the Nigerian Government or certain Nigerian officials participating fully in the scheme and

agreeing to pay an increased price in order to provide money for the bribes for various Nigerian governmental-political and military-figures.

Although the decision in *Hunt v. Mobil Oil Corp.*, *supra*, concerned claims based upon expropriation, the judicial examination of which is traditionally recognized as barred by the act of state doctrine (such circumstances are not present in ETC's alleged complaint), *Hunt* is nevertheless instructive in the weighing process used to determine whether the act of state doctrine is to be applicable. In *Hunt* it was claimed but for an alleged conspiracy, the business of the plaintiff would have continued to thrive. The Second Circuit agreed with the District Court that such allegations "necessarily would require a wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease Aresident al-Qadhafi." *Hunt*, 550 F.2d at 78.

Similarly, in this case, in addition to proving the bribe was in fact paid to or anticipated by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation of the bribe caused the award of the Nigerian Contract to Kirkpatrick International and whether ETC could have obtained the contract had the bribe not been paid or anticipated. Inquiry into the motivation of the Nigerian government, to the extent anticipated in *Hunt*, appears to be necessary for resolution of this case.[12]

[16] In certain situations, the act of state doctrine has been limited to discretionary, not ministerial acts of a foreign government. For example, in *Mannington Mills* the issue presented to the Third Circuit was the issuance of a patent by a foreign government. This action was regarded by the Third Circuit as ministerial

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[12] In *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F.Supp. 896, 908 n. 24 (E.D.Mich.1981), the court sought to distinguish a "kickback" in a situation which is not relevant to this litigation.

or an insignificant act of the sovereign. The granting of patents *per se* was found not to be within the purview of the act of state doctrine since it is not the type of sovereign activity that would cause substantial concern to the executive or legislative branches of our government.[13] Accordingly, there was no reason to bar the suit because of foreign policy concerns. *Mannington Mills*, 595 F.2d at 1294. In this same vein, the Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) is recognized to stand for a commercial exception to the act of state doctrine. *See* n. 11, *supra*. This exception in essence acknowledges that when a government acts in a commercial mode it is not acting as a sovereign and therefore the doctrine is inapplicable.

[17,18] *Clayco Petroleum* is also significant because the Court distinguished application of FCPA and indicated the FCPA is not an exception to the act of state doctrine. *Clayco Petroleum* indicates FCPA was intended to stop bribery and noted both the Justice Department and the Securities and Exchange Commission share enforcement responsibilities under FCPA. The opinion noted that any governmental enforcement represents a judgment of the Executive Branch on the wisdom of bringing a proceeding in light of the exigencies of foreign affairs. Act of state concerns are thus inapplicable, to the extent of a FCPA prosecution, since the purpose of the doctrine is to prevent the judiciary from interfering with the conduct of foreign affairs. *Calyco Petroleum*, 712 F.2d at 408-409, *citing*, *Sabbatino*, 476 U.S. at 423, 84 S.Ct. at 937-38; *Timberlane*, 549 F.2d at 605. *Clayco Petroleum* also suggests it is the screening of governmental proceedings, with state department consultation, which distinguishes FCPA enforcement from private suits. In private suits, the act of state doctrine remains necessary to protect proper conduct of national foreign policy. *Id.* 712 F.2d at 409.

[19] Significantly, prosecution was had against both Carpenter and Kirkpatrick. The offer of proof executed by Carpenter is

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[13] It is noted *Mannington Mills* did not create an exception to the act of state doctrine based on the ministerial-discretionary dichotomy. *See Curtiss-Wright*, 694 F.2d at 303.

carefully worded and does not establish any bribes were in fact paid to a member of the Nigerian Government although it adequately sets forth the requirements to establish Carpenter intended such action to take place. Thus, a violation of FCPA demonstrated. Likewise, the transcript with regard to the sentencing of Kirkpatrick for the violation of FCPA sets forth the concern of the United States Government and the lack of a disclosure order from the State Department with regard to the allegations of bribery concerning the Nigerian Contract. Read together, these documents indicate a conscious decision on behalf of the Executive Branch through the Department of State for a limited prosecution under FCPA (limited in the amount of disclosure of facts) and the efforts of the Government in resisting attempts by the Nigerian Government in discovering information with regard to what Carpenter knew of the payment of the bribes.[14]

[20,21] In light of the State Department Position, ETC has suggested application of a form of the so-called "Bernstein" exception to the act of state doctrine.[15] The State Department Position

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[14] In addition to all of the allegations in the amended complaint which allege by necessity Nigerian Government involvement, Article XX of the Nigerian Contract provides that "[t]his Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria . . . ." In Article XXI of the Nigerian Contract provides for disputes "to be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria. . . ." To date, the government of the Republic of Nigeria has not taken any steps to repudiate the acts of its governmental officials. This inaction is significant.

It has been noted in two decisions that unreputed acts of a foreign government can be scrutinized if they resulted from corruption of government officials. *Sage Intern*, 534 F.Supp. at 910; *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680, 690 (S.D.N.Y.1979). *Sage* relies upon *Gulf & Western* and *Gulf & Western* cites *Hunt*, 550 F.2d at 79 as authority for this statement. However, *Hunt* specifically states: "This appeal therefore is not the proper vehicle for consideration of international commercial bribery insofar as it affects the act of state doctrine." *Id.*

[15] In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768, 92 S.Ct. 1808, 1813-14, 32 L.Ed.2d 466 (1972) (Brennan, J., dissenting) *reh'd denied*, 409 U.S. 897, 93 S.Ct. 92, 34 L.Ed.2d 155 (1972) a plurality of the Supreme Court adopted the "Bernstein" exception. "[W]here the Executive

(footnote continued)

indicates: "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Additionally, the State Department states that judicial inquiry into "motivations of the Government of Nigeria's decision to award the [Nigerian C]ontract" would not be precluded by the act of state doctrine. The State Department Position, however, goes on to note inquiries into the motivation and validity of actions by foreign states and discovery against foreign government officials may seriously affect United States foreign relations. (Appendix A). As such the State Department fails to clearly "sign off" on the application of the act of state doctrine in this case.

> The State Department opines that:
> inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials *may seriously affect United States foreign relations*. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at *each relevant stage* in the proceedings. Moreover, *the court should endeavor to assure that no unnecessary inquiries* are made, *or allegations* tested during the course of discovery or trial.

(Appendix A, emphasis added). It is significant that in light of this caution, *this court* is urged "to assure that no unnecessary inquiries are made, or allegations, tested during the course of discovery or trial." [18] *Id.*

Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *Id.*

[18] For example, a consideration of this concern of the State Department clearly would have to include the issuance of a subpoena for records in Nigeria. Since such an action may well affect the foreign relations of this country, a court must weigh the interests of this country and Nigeria before issuing such a subpoena. A court must give "deference to the determination by the Executive Branch – the arm of the government charged with primary responsibility for

(footnote continued)

[22] The overview and judgments of this court, as urged by the State Department, may well have a significant impact on the foreign affairs on this country – an area of decision-making the Constitution largely commits to the discretion of the Executive. Before launching investigations on foreign soil, or of foreign nationals, or of matters implicating international diplomacy, the Executive has the option to weigh the implications of such conduct on the overall foreign policy of this country. This obviously will not happen in the scenario suggested by the State Department Position.

[23] Equally important to this court's determination of whether the parties to this matter are making unnecessary inquiries or testing unnecessary theories is whether there is any risk to national security. The Executive Branch must make the decisions as to whether disclosure of facts will have any ramification as well as on diplomatic relations. In this regard, as noted earlier, Carpenter's offer of proof upon which his criminal conviction for violating FCPA is based is carefully and narrowly worded. It cannot be said such careful wording is without intent or significance. See, the Levy Representations.

The significance of the impact of this case on the Government of Nigeria (see the Levy Representations) and on the conduct of this country's foreign policy (see the State Department Position) is obvious. The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy.[17]

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formulating and effectuating foreign policy – that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure." *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (citations omitted). This is not what is suggested by the terms of the State Department Position.

[17] No individual who is responsible for or knowledgeable of this nation's foreign policy or security will be in a position to know of the pretrial and trial decisions and evaluate their impact on foreign policy. Moreover, even if such person were available to the court, counselling the court for or against such decisions would pose serious problems of, at the least, an appearance of impropriety.

(footnote continued)

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat v. United States*, 219 U.S. 346, 355, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911) (citation omitted). The essence of judicial power is the resolution of cases or controversies. *Id.* at 356, 31 S.Ct. at 253. There is a notable absence of Constitutional authority for a court to assume responsibility for the conduct of a segment of foreign policy, which is what the State Department suggests.

Neither Congress nor the Executive may vest in or assign to judges holding office under Article III powers beyond those clearly confined to them by the Constitution. Nor may courts exercise such powers if granted or delegated. *See Buckley v. Valeo*, 424 U.S. 1, 123, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976); *Muskrat*, 219 U.S. at 356, 31 S.Ct. at 253-54; *Ex Parte Siebold*, 100 U.S. (10 Otto) 371, 398, 25 L.Ed. 717 (1879).

There are foreign policy considerations involved in ETC's proving its cause of action. Proof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria with regard to its failure to date to take action against government officials involved and/or other individuals involved. The July 31 letter from counsel to ETC to the Republic of Nigeria requesting a declaration of approval with regard to this civil litigation, even if a Nigerian response is forthcoming, is not dispositive of the issues. Indeed, it is the conduct of foreign policy by the Executive and Legislative Branches of this Government which must be controlling.

[24,25] ETC's amended complaint is aimed at alleged antitrust and RICO violations of defendants which require inquiry into

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Moreover, such a procedure (although not explicitly suggested by the State Department) would bring the basic separation of powers rule into question. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1 Annals of Congress 581, (quoted in *Myers v. United States*, 272 U.S. 52, 116, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926)).

the actions, conduct and motivation of the Republic of Nigeria and its agents. Although "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations[,]" *Curtiss-Wright*, 694 F.2d at 304 (citation omitted), I am satisfied the Moving Defendants have established[18] the actions, conduct and motivation of the Republic of Nigeria and its agents are ". . . basic and fundamental to the alleged antitrust [,RICO and other] behavior and [are] more than merely peripheral to the overall [alleged] illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293. Moreover, the suggestion of the State Department is neither practical nor constitutional. The motion to dismiss because of the act of state doctrine is granted.

E. *Appeals of Magistrate's Orders*

1. *Standard of Review*

[26] Also before the Court are three appeals of orders entered by Magistrate Hedges, two of which are discovery related and the third sustains Carpenter's claim of privilege against self-incrimination which defendant asserted at his deposition. In considering each of the three appeals, the Court must apply the standard of review of a magistrate's order as set forth at 28 U.S.C. § 636(b)(1)(A), Fed.R.Civ.P. 72(a), and Rule 40(A) of the Local Rules of the United States District Court for the District of New Jersey. The Third Circuit has held a magistrate's order can be set aside only if it is found to be clearly erroneous or contrary to law. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1113 (3d Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987).

[27] "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire *record* is left with the definite and firm conviction that a mistake has

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[18] It is the burden of the Moving Defendants to establish the applicability of the act of state doctrine. *Curtiss-Wright*, 694 F.2d at 303 n. 4, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684, 96 S.Ct. 1854, 1856, 48 L.Ed.2d 301 (1976).

been committed." *Agricultural Services Assn., Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1071 (6th Cir.1977) *quoting United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541-42, 92 L.Ed. 746 (1948). Several courts have also held that a magistrate's order in a discovery dispute is subject to great deference and will only be reversed if found to be an abuse of discretion. *See Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D.N.Y.1982); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 95 F.R.D. 398, 399 (S.D.N.Y.1982), *aff'd* 814 F.2d 90 (2d Cir.1987).

2. *Appeal from the May 30, 1986 Order*

ETC appeals from an order entered by Magistrate Hedges on May 30, 1986 [*], which stayed plaintiff's discovery pending disposition of the motions to dismiss.

[28,29] The court converted the defendants' motion to dismiss into a summary judgment motion only on the limited question of the applicability of the act of state doctrine because of the additional submissions. In response, ETC filed the instant appeal on the incorrect assumption that additional discovery on the act of state is necessitated. Accordingly, ETC appeals on the ground that the magistrate's order is "an abuse of discretion and contrary to law" (ETC's Notice of Appeal) because ETC is deprived of conducting discovery which may produce facts relevant to the act of state issue. However, applicability of the act of state doctrine (*see* Section D) is purely a legal question, the resolution of which requires no further factual development. Furthermore, additional discovery is inconsistent with the conclusions regarding the act of state doctrine. The taking of discovery by ETC would necessarily involve inquiry into the action of the Nigerian Government and its officials.

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[*] This appeal was not filed within the time limit prescribed by Local Rule 40(D)(4)(a), however, due to the somewhat confusing circumstances surrounding these motions, it shall be considered. The Affidavit of Alan A. Turner dated September 10, 1986, and the Memorandum of Law in Support of the Notice of Appeal submitted in connection with this motion detail the facts regarding these circumstances.

Applying the limited standard of review mentioned previously, ETC has not demonstrated the magistrate's order is clearly erroneous or contrary to law. Only after the court posed questions to counsel regarding the act of state question did ETC seek further discovery which was unnecessary for the motion. At the present juncture, additional discovery is contrary to the application of the act of state doctrine. Accordingly, the magistrate's order is affirmed.

3. *Appeal of the July 16, 1986 Order*

[30] During his June 30, 1986 deposition Carpenter asserted his privilege against self-incrimination and refused to answer certain questions. Magistrate Hedges sustained Carpenter's claim of privilege in a Letter-Order and Opinion, dated July 16, 1986. This appeal followed.[20]

Prior to his deposition, Carpenter submitted an affidavit (the "Carpenter Aff.") setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual bases for assertion of the privilege. As discussed earlier in this opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media coverage and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. (Carpenter Aff., ¶2) Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian Contract. (*Id.* at § 3) Akindele further warned Carpenter not to travel to Nigeria and to exercise extreme care in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. (*Id.* at ¶ 4)

In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted

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[20] Disposition of the appeal was postponed until oral argument and decision on the motion to dismiss.

to get [Carpenter] to Nigeria." (*Id.* at ¶5) This information, which originally came from Interpol, was relayed to Carpenter. (*Id.* at ¶ 5) Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated." (*Id.* at ¶ 6)

In sustaining Carpenter's Fifth Amendment privilege, Magistrate Hedges applied the guidelines set forth in *United States v. Flanagan*, 691 F.2d 116 (2d Cir.1982). In *Flanagan*, defendant was subpoenaed to appear before a federal grand jury which was investigating an alleged gun-smuggling conspiracy in operation for the benefit of the Irish Republican Army in Ireland. After his intent to invoke the Fifth Amendment was known, defendant Flanagan was granted immunity from the use of his testimony against him in any subsequent criminal proceeding. *Id.* at 119.

Flanagan's motion to quash the subpoena was based in part on the argument that because the grant of immunity would not protect him from prosecution in foreign countries, a protection coexistive with the Fifth Amendment privilege. Although the Second circuit found "Flanagan's fear of foreign prosecution, viewed objectively, [to be] remote and speculative rather than real, reasonable, or substantial" *id.* at 122, the court's discussion of factors to be considered in making such a ruling is helpful.

Among the factors detained in *Flanagan* are the "reality or remoteness of the risks of incrimination under foreign law" *id.*, the existence of foreign laws authorizing prosecution of the criminal acts in question, whether the testimony may enable the foreign government to seek extradition, and whether the testimony is likely to be disclosed. *Id.* at 120-23. In his decision, Magistrate Hedges considered these factors as applied to Carpenter and concluded the privilege should be upheld.

On appeal, ETC contends the protection afforded by the Fifth Amendment is not available to Carpenter because he has already pled guilty to a violation of the Foreign Corrupt Practices Act. Furthermore, ETC disputes the existence of a real threat of prosecution. Alternatively, ETC suggests the testimony should be taken under a protective order.

The Fifth Amendment guarantees every person freedom from self-incrimination and protects a witness against providing testimony "leading to the inflictions of penalties affixed to . . . criminal acts." *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972) *reh'g denied*, 408 U.S. 931, 92 S.Ct. 2478, 33 L.Ed.2d 345 (1972) (citations omitted). The protection is available where the testimony "would furnish a link in the chain of evidence needed to prosecute" the witness for a crime, provided "the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). Consideration of ETC's arguments necessitate a review of the standard for invoking claims of the Fifth Amendment privilege.

The extent to which the Fifth Amendment privilege may properly be asserted on the grounds of potential prosecution in foreign countries is unclear. *United States v. Kowalchuk*, No. 77-118, slip op. (E.D.Pa. Oct. 20, 1978).[2] There is, however, agreement that the Fifth Amendment only protects against real and substantial threats of incrimination, not speculative or theoretical possibilities. *Zicaredi v. New Jersey Investigation Commission*, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972). In assessing the severity of threat, one court has found there to be a

> common theme to all of the reported cases in that questions relating directly to criminal activities in foreign countries pose a more serious threat of incrimination than do questions about events and activities within this country having only direct and remote connection to foreign culpability.

Kowalchuk, slip op. at 4, citing *In re Parker*, 411 F.2d 1067 (10th Cir.1969), *vacated as moot*, *Parker v. United States*, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed.2d 81 (1970); *In re Cardassi*, 351 F.Supp. 1080 (D.Conn.1972).

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[2] This unreported decision was included in Carpenter's opposition to the appeal and was therefore available to all counsel.

ETC contends the Fifth Amendment protection is not available to Carpenter in light of Carpenter's previous plea of guilty to violation of the FCPA. This argument is not persuasive for two reasons. First, there would be no need to depose Carpenter if the information sought had been disclosed in connection with Carpenter's earlier prosecution. It is logical then to assume the requested information goes beyond the investigation under the FCPA. Therefore, Carpenter may invoke the Fifth Amendment to avoid further incrimination. Second, case law supports protection of Carpenter's testimony because prior disclosure is not held to be a waiver of the privilege. *United States v. Yurnasovich*, 580 F.2d 1212, 1218-1220 (3d Cir.1978).

> The initial statement is incriminating, a subsequent statement on the same subject would necessarily be further incriminating because the second statement would corroborate the earlier statement, making it more difficult for the witness to discount the earlier statement and hence increasing the danger of conviction.

Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45, 49 (S.D.N.Y.1982) *quoting E.F. Hutton & Co. v. Jupiter Development Corp.*, 91 F.R.D. 110, 115 (S.D.N.Y.1981).

[31] ETC also challenges Carpenter's assertion of the Fifth Amendment on the ground that Carpenter's fear of foreign prosecution is not founded. This argument ignores certain relevant facts. As previously detailed, Carpenter has been informed on more than on occasion of the danger he faces by travelling in Europe or Africa (Carpenter Aff. at ¶ 4) and of Nigerian official's desire to prosecute him. (*Id.* at ¶ 3) These facts are not properly ignored because determinations as to whether the privilege is justified are to be made by the trial court based on the particular circumstance of each case. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951).

[32] Furthermore, contrary to ETC's contentions, a pending foreign prosecution is not a prerequisite to Fifth Amendment protection. *See Kawalchuk*, slip op. at 8 ("[t]he actual pendency of

criminal proceedings is not a prerequisite to the successful invocation of the Fifth Amendment privilege."), *In re Cardassi*, 351 F.Supp. at 1085 (interpreting *Zicarelli*, not to require any indication that a foreign prosecution is "imminent.").

The magistrate's decision to uphold Carpenter's Fifth Amendment claim has not been shown to be clearly erroneous or contrary to law. Based on the magistrate's thorough discussion and this court's independent analysis of the relevant facts and applicable case law, the magistrate's decision shall be affirmed.

4. *Appeal of the January 20, 1978 Order*

As part of discovery, ETC issued a deposition notice and subpoena *duces tecum* to Steven Levy, an attorney with the Department of Justice. ETC sought Mr. Levy's deposition and production of materials obtained by Mr. Levy in connection with an ongoing grand jury investigation. The United States of America ("the Government") moved to quash the subpoena pursuant to Rule 26(c) Fed.R.Civ.P.

On January 20, 1987, Magistrate Hedges granted in part and denied in part the Government's motion to quash, and ETC appealed. At oral argument it was determined the issues on appeal had been rendered moot because the subpoena was withdrawn. (3/6/87 Tr. 61:6-13)

Conclusion

Because ETC's amended complaint alleges facts sufficient, for the purposes of these motions to dismiss the pleading, to establish a relationship among Holding, IDC, Carpenter and Kirkpatrick to support the potential imposition of liability upon Holding and IDC for wrongful actions of Carpenter and Kirkpatrick, the motion to dismiss Holding and IDC as defendants is denied.

Because ETC's amended complaint alleges that ETC failed to procure the Nigerian Contract because of the alleged antitrust and RICO violations committed by defendants, the motion to dismiss those claims for lack of standing is denied.

Because ETC has failed to allege in its pleadings facts establishing a pattern of racketeering activity as required under RICO and the New Jersey Anti-Racketeering statutes, the motion to dismiss ETC's anti-racketeering claims is granted.

Because of the act of state doctrine, the motion to dismiss ETC's complaint against the defendants is granted.

The parties have agreed to dismiss without prejudice counts five and six of the complaint.[22] Accordingly, counts one, two, three, four and seven are hereby dismissed with prejudice; counts five and six are dismissed without prejudice pursuant to agreement of counsel.

APPENDIX A

United States Department of State

The Legal Adviser

Washington, D.C. 20520

December 10, 1986

The Honorable
Alfred L. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

Re: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., et al.*,
Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views

[22] See letter of March 16, 1987 from counsel on behalf of Emro and Ruppert to counsel for plaintiff.

of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions . . . None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment*

Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48 (5th Cir.1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd. v. Cadillac Gage Co.*, 534 F.Supp. 896, 908 (E.D.Mich.1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F.Supp. 3 (D.D.C.1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

/s/ Abraham D. Sofaer
Abraham D. Sofaer

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.,
IDC INTERNATIONAL
S.A. LUXEMBOURG,
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC.,
ROSS E. SAXON c/o NAUTILUS
ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.,

Appellants in No. 87-5546

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Present: GREENBERG and SCRICIA, *Circuit Judges* and POLLAK,
*District Judge**

*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 20, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 5, 1987, be, and the same is hereby reversed insofar as the said District Court's act of state decision, the dismissal of the RICO and Anti-Racketeering Act claims and the affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. It is further ordered and adjudged that the said judgment is affirmed as to the other issues, and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Clerk

May 2, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5328 and 87-5546

Environmental Tectonics, Appellant in No. 87-5328

vs.

W. S. Kirkpatrick Inc., etc.

W. S. Kirkpatrick & Co., Inc., W. S. Kirkpatrick & Co., International and D.I.C. (Holding) Inc.,
Appellants in No. 87-5546

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 22, 1988.

Circuit Judge

Dated: May 26, 1988

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2066

In the Supreme Court of the United States

OCTOBER TERM, 1987

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And W.S. KIRKPATRICK & CO., INTERNATIONAL,
Petitioners,

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below correctly held that the act of state doctrine does not bar adjudication of the instant litigation where:

(a) the action is a lawsuit between private American litigants concerning the Defendants' commercial bribery of Nigerians in order to deprive Plaintiff of a commercial contract with the Nigerian Air Force;

(b) the United States Department of State has advised the court below that it does not believe the act of state doctrine bars the court from adjudicating the dispute;

(c) the claims before the Court will require, at most, an inquiry only into the motivation behind, and not the legality of, the foreign government's action in awarding a commercial contract; and

(d) the *Bernstein* and commercial transaction exceptions to the act of state doctrine apply to this action.

2. Whether the court below correctly held that Plaintiff's Amended Complaint sufficiently pleads a RICO "pattern of racketeering activity" where:

(a) the Amended Complaint alleges—and related documents before the court establish—that Defendants agreed to pay, and thereafter paid, $1,764,019.58 in bribes violative of the Foreign Corrupt Practices Act in a series of eight payments over the course of eleven months to two Panamanian corporations and, thence, in a further series of payments, to or on behalf of a collection of Nigerian officials; and

(b) paragraph 57 of the Amended Complaint, based upon an open-court disclosure by the United States Attorney, alleges that "... the affairs of the [Defendants'] enterprises were also conducted through a pattern of racketeering activities ... in that [a Defendant] had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian contract ...".

PARTIES TO THE PROCEEDINGS BELOW

Respondent Environmental Tectonics Corporation, International, is a United States Virgin Islands corporation and has a parent corporation as follows:

Environmental Tectonics Corporation, a Pennsylvania corporation.

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In the
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-2066

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
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STATEMENT OF THE CASE

A. Procedural History

This is an action brought by Environmental Tectonics Corporation, International ("ETC" hereafter) against W. S. Kirkpatrick & Co., Inc. ("Kirkpatrick" hereafter), its corporate parents and its corporate DISC subsidiary, as well as two of Kirkpatrick's corporate officers and its two corporate sub-contractors and their respective officers, for violations of the

States Department of State as to the applicability *vel non* of the act of state doctrine. The parties responded with lengthy submissions in response to the specific questions posed by the court below (A. 174-282).

The State Department, likewise, responded to Judge Lechner's request in a letter dated December 10, 1986 and authored by former federal Judge Abraham Sofaer, Legal Advisor to the Department of State (A. 293). The submissions of the parties and the State Department were considered by the District Court, along with a Rule 56(f) affidavit by counsel for Plaintiff in relation to the act of state issue, thereby converting the Motions to Dismiss into a Motion for Summary Judgment pursuant to Rule 56 (A. 260).[3]

Following oral argument on March 19, 1987, the District Court filed its opinion and final order on May 1, 1987 rejecting various arguments made by the Defendants but granting summary judgment as to all Counts on behalf of all Defendants and against Plaintiff on the basis of the act of state doctrine; granting in the alternative Defendants' Motion to Dismiss as to the RICO Counts; and affirming in the further alternative the decision of the Magistrate who had allowed Defendant Carpenter to refuse to answer questions upon duly noticed deposition on the basis of Carpenter's alleged Fifth Amendment privilege (A. 469-520).

A timely notice of appeal was filed by ETC and argument was held with respect thereto in the court below on November 20, 1987. On May 2, 1988, the court below filed its opinion and Order in which it reversed the District Court on its act of state decision and its dismissal of the RICO and anti-racketeering claims.[4] On June 17, 1988, a timely Petition for Writ

3. Although Defendants' initial Motions to Dismiss were directed against Plaintiff's original Complaint, the courts below treated the Motions as if filed against the Amended Complaint (A. 472). Likewise, Defendants who had not theretofore joined in the Motions joined in them at the time of oral argument in the District Court (A. 474). Respondent takes no issue with either of those matters.

4. The court also reversed the decision by the District Court affirming the Magistrate's decision upholding an assertion of Fifth Amendment privilege by individual defendant Carpenter. That decision is not the subject of a Petition for a Writ of Certiorari in this Court.

of Certiorari to the United States Court of Appeals for the Third Circuit was filed by three of the corporate Defendants below.

B. Statement of the Facts

Defendant Kirkpatrick is a New Jersey corporation having its principal place of business in Fairfield, New Jersey (A. 92). Defendant DIC (HOLDING) Inc. ("DIC" hereafter) is a Delaware corporation which owns all of the stock of Kirkpatrick and which is, in turn, wholly owned by Defendant International Development Corporation, S.A. ("IDC" hereafter), a Luxembourg corporation (A. 92). Defendant W. S. Kirkpatrick & Co., International ("International" hereafter), is the DISC corporation organized by Kirkpatrick, DIC and IDC to be the contracting party on their behalf in connection with the transaction in question (A. 95).

Defendant Carpenter first became an employee of Kirkpatrick in 1954 (A. 95). By January 1978, he had become Chairman of Kirkpatrick's Board of Directors and its Chief Executive Officer (A. 95). In that year, on January 3, he sold all of his shareholder and equity interest in Kirkpatrick to DIC and entered into a consulting agreement/employment contract with Kirkpatrick and DIC whereby he continued as Chairman of the Board and Chief Executive Officer of Kirkpatrick through December 31, 1982 (A. 96).

During all pertinent times, Defendant Kirkpatrick sold and brokered equipment, parts and facilities relating to aircraft and aircraft facilities, both domestically and to airlines, airports and national air forces doing business outside the continental United States (A. 94-95). In 1980, while acting as Chairman and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity to sell aeromedical equipment, including ejection seat trainers, disorientation simulators and other devices, to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base, Nigeria (A. 100). At the time, Kirkpatrick had no independent capacity to design, build or supply such a facility; accordingly, beginning shortly thereafter, Carpenter and Kirkpatrick solicited the services of Defendant Emro, through

its president Ruppert, to act as the designer of the equipment and to provide engineering services incident to the Nigerian contract opportunity (A. 100). Likewise, Kirkpatrick lacked the independent ability to manufacture or supply the equipment to be provided to Nigeria; accordingly, during the same time period, Carpenter and Kirkpatrick solicited Defendant Nautilus Enviromedical Systems, Inc. ("Nautilus" hereafter), through its President Ross E. Saxon ("Saxon" hereafter), to act as the subcontractor, manufacturer and supplier of the medical equipment (A. 100).[5]

Kirkpatrick's competitor in the business of supplying aeromedical equipment and facilities, including the aeromedical equipment and facilities to be sold to Nigeria, is Plaintiff Environmental Tectonics Corporation, International, a Virgin Islands corporation having its principal place of business in Southampton, Pennsylvania (A. 91). Like the Defendants, ETC is engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment and facilities both domestically and to airlines, airports and national air forces outside the continental United States (A. 101).

In contrast to Kirkpatrick and its corporate relatives, however, ETC had the independent ability to design, manufacture, supply and install both the facility to house the aeromedical service and the component parts thereof (A. 101). Accordingly, on or about February 2, 1981, when it was disclosed that the Nigerian Air Force was contemplating the purchase of physiological training equipment for use at, and construction of, an aeromedical center at Kaduna Air Force Base, ETC immediately submitted *pro forma* pricing information to its agent which, in turn, forwarded that pricing information to the responsible Nigerian authorities (A. 104).

Regrettably, at or about the same time ETC was submit-

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5. In a submission to the District Court, Kirkpatrick has admitted that it fulfilled no more than 95% of its contract obligation under the Kaduna, Nigeria, contract. Kirkpatrick declares, however, that Nautilus is completing the construction of the aeromedical facility (A. 196).

ting its initial legitimate pricing proposal, Defendant Carpenter, acting on behalf of all Defendants, held meetings with Defendant Benson "Tunde" Akindele and one Alhaji Ringim, in which the following occurred (as reflected in Carpenter's contemporaneous memorandum of March 30, 1981) (A. 225-228):

> At the first meeting with Benson Akindele, we [Saxon and Carpenter] spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.
>
> We then got into the pricing, and we told [Benson] that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000.... We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".
>
> We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.[6]

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6. Defendants' bid, as accepted by Nigeria, was for $10,835,048.75 (A. 125).

Ross and I then went back to the hotel, and Ross recalculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus,[7] and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. . . .

At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

* * * *

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that . . . the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and as-

7. Defendants ultimately paid a "commission" of $1,764,019.58 (A. 162).

sistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

In May 1981, less than two months after the meeting amongst Defendants and their representatives regarding the "commissions" discussed in the foregoing memorandum, two Panamanian bearer share corporations were established whereby, pursuant to written agreements, Kirkpatrick agreed to pay them a commission equal to 20% of the prices agreed to be paid by Nigeria for the aeromedical facility (A. 162). These corporations were controlled by Defendant Akindele for the sole purpose of receiving the "commission" payments from Defendants and making distribution of the sums thereby received (A. 160).

In July 1981, ETC pursued its endeavor to obtain the Nigerian contract by contacting the Armed Forces Attache of the Nigerian Embassy in Washington, D.C. (A. 160). In September 1981, ETC's President attended the International Congress on Aviation Medicine in Nancy, France, and while there met with Nigerian Air Force officials and reviewed with them the aeromedical needs at Kaduna (A. 160-161). In December 1981 ETC's president travelled to Lagos, Nigeria, for business meetings with Nigerian Air Force officials and to submit a formal bid on the Kaduna aeromedical contract (A. 161). In February 1982, ETC's president returned to Lagos and submitted ETC's final formal bid (A. 161).

Again, while ETC was pursuing ethical and legal avenues for obtaining the Nigerian business, Defendants pursued their criminal business methods. In addition to creating the two Panamanian bearer share corporations mentioned above,

Messrs. Akindele and Ringim continued to meet with Defendants. In particular, Defendants Carpenter and Saxon, acting on behalf of the Defendant corporations, met with Akindele and Ringim through at least March 5, 1982 and Defendants had agreed, as of September 1981, that their 20% "commission" on the Nigerian contract would be distributed as follows:

2½%—for Akindele
5 %—for air force
2½%—medical group
5 %—party
2½%—minister himself
2½%—other key defense personnel (A. 233)

On March 19, 1982, a contract was entered into between the Nigerian Ministry of Defense and Kirkpatrick's DISC corporation for purchase of the aeromedical equipment and turnkey construction of the facility at a total price of $10,835,048.75 (A. 162).

In September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of that contract; immediately thereafter, on September 30, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $117,929.34 and $193,657.70 to be made, respectively, to the Panamanian corporations Deriks and Los and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and to the Nigerian political and military figures in the proportions quoted above (A. 105).

In December 1982, Nigeria made the next progress payment on the contract; immediately, $290,486.50 was paid to each of the Panamanian corporations by Defendants and those funds were, likewise, distributed to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions already described (A. 106).

In February 1983, Nigeria made its next progress payment; on February 2 payments in the amount of $145,243.27 were made to each of the Panamanian corporations and dis-

tributed therefrom in the amounts and for the purposes already described (A. 107).

Finally, in August 1983, Nigeria made its last progress payment and immediately—on August 8, 1983—Defendants caused payments of $290,486.50 to each of the Panamanian corporations and consequent distribution of those funds in the amounts and to the persons as described in Carpenter's March 8, 1982 memorandum (A. 107-108). The amounts distributed by Defendants to the Panamanian corporations, and thence to the intended "commission" recipients, totalling $1,764,019.58, equal 20% of the funds received by the Defendant corporations from Nigeria pursuant to the contract of March 1982 (A. 161-162).

In April 1983, upon becoming aware that its bid price to Nigeria for the aeromedical facility was several million dollars lower than the Kirkpatrick bid/contract price for the same equipment, ETC commenced an investigation as to the contract award and reported the facts it could learn to the Nigerian Air Force and to the United States Embassy in Lagos (A. 162). Subsequently, investigation ensued at the hands of the Federal Bureau of Investigation and the United States Justice Department. As a consequence, a plea bargain was struck involving both Defendant Carpenter and Defendant Kirkpatrick. As to Carpenter, he was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, that violation relating to the December 21 payments referred to above (A. 374). As to Defendant Kirkpatrick, it was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, that Count relating to the same December 1982 payments (A. 477).

In its Offer of Proof to support the guilty pleas in the United States District Court for the Distict of New Jersey (Rodriguez, J.), the United States and Defendant Kirkpatrick, by its present counsel, agreed that the evidence at trial would show that (A. 32-35):

> In 1981, Harry G. Carpenter, who was at that time

Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows: . . . [See p. 10, *supra.*]

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W. S. Kirkpatrick to obtain the 10.8 million

dollar Aero medical contract from the Government of Nigeria (A. 32-33).

* * * *

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments was [sic] made as follows: . . . [See p. 10, *supra*.)

The payment charged in the information is the second payment. The second payment to Deriks and Los occured [sic] on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union International telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.[8]

Defendant Carpenter was sentenced to pay a fine of $10,000.00 and to perform 200 hours of community service (A. 28); corporate Defendant Kirkpatrick was sentenced to pay a fine of $75,000.00 over a period of five years commencing in January 1986 (A. 55).[9]

Upon learning of the guilty pleas by Defendants Carpenter and Kirkpatrick, ETC consulted counsel and filed the instant action in the United States District Court for the District of New Jersey on February 26, 1986 (A. 3).

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8. An essentially identical Offer of Proof, agreed to both by Defendant Carpenter individually and by his attorney, was filed with respect to Defendant Carpenter (A. 9-12). These Offers of Proof were both before the courts below and are of record in the respective criminal proceedings before the United States District Court for the District of New Jersey.

9. There is no evidence of record that either Defendant Carpenter or Defendant Kirkpatrick has complied with any or all of the sentences imposed by Judge Rodriguez.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW CORRECTLY HELD THAT THE ACT OF STATE DOCTRINE IS INAPPLICABLE TO THIS LITIGATION.

First, the act of state doctrine does not apply to this litigation because acts of bribery (and/or extortion) are not "acts of state" under any definition of that term. For example, as defined by the Restatement (Second) of Foreign Relations Law, the act of state doctrine proscribes examination by a court into ". . . the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." *Restatement (Second) of Foreign Relations Law*, §41. Comment d to Section 41 further refines the definition of "act of state" by saying:

> An "act of state" as the term is used in this Title involves the public interests of a state as a state . . . In determining whether an act is an act of state, the branch or agency of the government—executive, judicial, or legislative—that performed the act is not as important as is the nature of the action taken. . . .

Tentative Draft No. 7 of the Restatement of the Law Pertaining to Foreign Relations Law of the United States, §469, further refines this clear understanding of the meaning of the phrase "act of state" by saying:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other *acts of a governmental character* done by a foreign state within its own territory and applicable there. (Emphasis supplied.)

The Draft's exegesis of this definition in the following twenty-one pages (including parsing and analysis of this Court's act of state decisions) establishes that the doctrine

proscribes only inquiries into the legality *vel non* of formal acts of sovereign authority (*see, e.g.*, p. 61). The doctrine does not proscribe adjudication of the legality under United States law of conduct engaged in by United States citizens.

In this instance, it is conceded by the parties in their submissions in response to District Judge Lechner's inquiry that, first, one or more Nigerian criminal statutes concerning bribery have been violated by the conduct of Petitioners here put in question and, second, there is international agreement that bribery is criminal and, hence, outside international standards of commercial behavior (A. 174-259). That is, the Penal Code of Nigeria specifically makes criminal the offering or giving of gratification to a public servant (*i.e.*, bribery) and the taking of gratification (either directly or through an agent) by a public servant (*i.e.*, extortion). Glendhill, *The Penal Codes of Northern Nigeria and the Sudan* (1963) (A. 464-468). And, of course, the same laws make criminal the profiting, as did Petitioners here, by virtue of gratification (bribery or extortion). *Ibid.* (A.468)

In sum, as reiterated by the court below in its *Remington Rand* decision, acts of state consist of those "considered policy determinations by a government to give effect to its political and public interests." *Remington Rand Corporation-Delaware v. Business Systems, Incorporated*, 830 F.2d 1256 (3d Cir. 1987).

There can be no suggestion that—under the law of Nigeria, under the law of the United States of America, or under any international standard of jurisprudence—acts of bribery (or acts of extortion) constitute a considered policy determination by the country of Nigeria by which that country has given effect to its political or public interests. Therefore, the act of state argument in this case fails at the threshold.

Second, the act of state doctrine does not apply in this instance for the reasons articulated by State Department Legal Advisor (formerly District Judge) Sofaer in his letter sent to District Judge Lechner in response to Judge Lechner's

specific telephonic request. That is, as the United States, via the Solicitor General, has repeatedly urged upon this Court in *amicus curiae* briefs:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions. . . .
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added.)

As is recognized by the courts below, there is no issue in this litigation whereby the bribe-tainted contract is sought to be set aside or damages are sought against the Federal Republic of Nigeria. Rather, the sole issue even arguably touching upon conduct by a Nigerian official will be whether and to what extent the issuance of the contract to Petitioners was

motivated by the bribes paid and offered to be paid.[10] Thus, as is correctly determined by the court below, this case falls outside any understanding of the act of state doctrine.

Third, employment of the act of state doctrine to bar litigation of claims such as this—where the claim is grounded on conduct not only arguably in violation of the Foreign Corrupt Practices Act, but conduct which has been admitted in American federal criminal proceedings to have been violative of the Foreign Corrupt Practices Act in fact—would prove too much.

As Professor Bazyler prophesied in his article, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 380-381 (1980):

> Another important federal law regulating the practice of American business in the international marketplace is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA prohibits the payment of bribes by American businesses to officials of foreign governments on the grounds that such activities hurt rather than help our foreign commerce. . . .
>
> Private litigants may find, however, that their suits are barred by the act of state doctrine. Since the violation is, by definition, a payment to a foreign official, inherent in every private suit under the FCPA is the involvement of a foreign government. Adjudicating FCPA enforcement actions will nearly always require an examination of the reasons for the payment and the motivation of the foreign official in accepting the payment. Courts might therefore invoke the act of state doctrine as a convenient

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10. It is also noteworthy, of course, that no argument can be made that extortion of, or receipt of, bribes was within the scope of the Nigerian contracting officials' authority. And, even were there such an argument—as has been implied by Petitioners heretofore—such a fact would still relate only to the motivation for the award of the contract and not to its legal efficacy.

excuse to avoid deciding difficult FCPA cases.

If the act of state doctrine were to bar adjudication of a lawsuit between two competing American corporations [such as the parties here] where defendants engaged in commercial bribery of foreign officials in order to deprive plaintiff of a commercial contract [such as occurred here], the Foreign Corrupt Practices Act would be a statute without teeth and Congress' intentions in leveling the playing field for international business competition by the enactment of this statute would be thwarted. Indeed, if this were a suit against the country of Nigeria for damages there would be no immunity for Nigeria under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602, *et seq.* Hence, it would be anomalous—and it would not serve American policy interests—to give private defendants more consideration under the rubric of the act of state doctrine than a foreign government would receive in similar circumstances under the Foreign Sovereign Immunities Act.[11]

Finally, the *Bernstein* and commercial activities exceptions[12] to the act of state doctrine apply to the instant litigation. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). That

11. To the extent there is a conflict between the lower court's decision in this case and the decision of the United States Court of Appeals for the Ninth Circuit in *Clayco Petroleum Corporation v. Occidental Petroleum Corporation*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703 (1984), such conflict does not require resolution by this Court. Simply put, *Clayco* is wrongly decided perhaps, in part, due to the fact that the litigants there had each engaged in bribery in attempting to outdo the other for oil concessions and the Ninth Circuit might well have decided to leave each of them, and their unclean hands, where the facts found them. In any event, the expansive reading of the act of state doctrine by the *Clayco* court is inconsistent with this Court's decisions creating and construing the doctrine.

12. While neither the *Bernstein* exception nor the commercial activities exception has been adopted by a majority of this Court, both exceptions have been endorsed by still-sitting pluralities of this Court.

is, Judge Sofaer's letter[13] for the State Department plainly supplies the executive department predicate for the *Bernstein* exception. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 1813 (1972) (Mr. Justice (now Chief Justice) Rehnquist writing for himself, Chief Justice Burger and Mr. Justice White). The commercial activities exception, albeit rejected by the court below, also plainly applies to this transaction, we suggest. That is, albeit the contract in question is a military procurement contract, the contract is merely a commercial contract and not a contract whereby the sovereign power is vindicated as, for example, in an expropriation or legislative decree or executive fiat. In short, this contract falls within the Roman law of *jure gestionis* and is not *jure imperii*.[14]

In short, for each and all of the foregoing reasons, the act of state doctrine does not apply to this litigation, the court below correctly so ruled, and this matter is not worthy of this Court's attention.

II. THE COURT BELOW CORRECTLY RULED THAT PLAINTIFF'S AMENDED COMPLAINT SUFFICIENTLY PLEADS A "PATTERN OF RACKETEERING ACTIVITY."

Mr. Justice White's now famous footnote in the opinion he authored for this Court in *Sedima, S.P.R.L. v. Imprex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985), framed the issue as to "pattern of racketeering activity" as follows:

> As many commentators have pointed out, the defini-

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13. Lest there be any doubt as to Judge Sofaer's understanding of the act of state doctrine, one need only read his opinion in *Sharon v. Time, Inc.*, 599 F.Supp. 538, 542-543 (S.D.N.Y. 1984) to be disabused of such doubt.

14. A further exception to the act of state doctrine not clearly articulated in other decisions or yet adduced by this Court is an exception where the foreign act arises out of fraud or corruption. *See, e.g., Sage International, Ltd. v. Cadillac Gage Company*, 534 F.Supp. 896 (E.D. Mich. 1981); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680 (S.D.N.Y. 1979). That exception would also plainly apply to this case.

tion of a "pattern of racketeering activity" differs from the other provisions in §1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," §1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. §3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

This footnote spawned a veritable cottage industry of learned commentary and judicial opinion writing. *See, e.g.*, Weissman, *Reflections on RICO Pattern Requirement After*

Sedima, 2 RICO Law Reporter 198 (1985); *The Pattern Requirement*, 16 RICO Law Developments (1986); *The Pattern Requirement*, 14 RICO Law Developments (1987); *Pattern*, 8 RICO Law Reporter 229 (1988). Indeed, as of this writing, this Court has granted *certiorari* in one case to consider the pattern requirement, *H.J., Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S.Ct. 1219, 56 U.S.L.W. 3647 (1988), and has pending before it eight Petitions, in addition to the present matter, all of which seek to bring the "pattern" requirement before this Court again. *See* Docket Nos.:

87-1051—*Hobson v. United States*, 825 F.2d 364 (11th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3594 (1987);

87-1262—*Rogers v. Liquid Air Corp.*, 834 F.2d 1297 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3632 (1988);

87-1350—*O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3672 (1988);

87-1358—*Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3654 (1988);

87-1478—*Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3707 (1988);

87-1530—*Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3722 (1988);

87-1742—*Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148 (8th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3823 (1988);

87-1854—*Cory v. Standard Federal Savings & Loan Asso-*

ciation, 843 F.2d 1386 (4th Cir. 1988) (unpublished opinion), *petition for cert. filed*, 56 U.S.L.W. 3823 (1988).

In a word, having opened the issue of Congressional intent in requiring a "pattern of racketeering activity", it now falls to this Court to resolve the issue.

While the cases summarized in the authorities cited in the preceding paragraph reflect a broad spectrum of views as to the meaning of "pattern", especially in regard to the twin requirements of continuity and relationship, the court below resolved the issue of "pattern" favorably to the plaintiff on the facts of this case. In doing so, the court below specifically followed its reading of the "pattern" requirement in *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987), as applied in the interim in *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666 (3d Cir. 1988). The *Barticheck* jurisprudence as to "pattern" had in turn been the culmination of a jurisprudential analysis over a series of cases in the Third Circuit in which the judges of that court (in particular Judges Higginbotham and Becker) had considered the interplay between continuity and relationship and had considered the opinions of the other Circuit Courts of Appeals and the other courts within the Third Circuit as the jurisprudence was developing. *See, e.g., United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1899 (1987); *Petro-Tech, Inc. v. Western Company of North America*, 824 F.2d 1349 (3d Cir. 1987); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F.Supp. 1412 (D.N.J. 1986), *rev'd*, 829 F.2d 1263 (3d Cir. 1987); *Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3654 (1988).[15]

In brief, the Third Circuit rejected a simplistic reading of "pattern of racketeering activity" and, construing the court's earlier authorities in the light of other federal courts' reasoning, laid down a fact-specific test as follows:

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15. This last decision is, of course, pending before this Court on a Petition for Writ of Certiorari at Docket No. 87-1358.

> . . . the existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as "continuous" and "related" but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. . . . *Barticheck*, 832 F.2d at 38-39.

The court below specifically rejected ". . . the position that a RICO pattern must involve two distinct unlawful schemes" and ". . . that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended. . . ." *Mendel*, 835 F.2d at 66.

In short, with respect to the continuity requirement of the "pattern" test, the court said:

> We read the legislative history's reference to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous." This determination necessarily depends on the circumstances of the particular case. *Id.* at 66.

Having developed this fact-specific test for determination of the "pattern" requirement in *Barticheck*, the court below ruled in this particular piece of litigation that:

> . . . To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, 843 F.2d 666, 676 (3d Cir. 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged in the amended complaint—mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act—were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir. 1987). But, to focus only on the series of payments—i.e., one bribe divided into four parts—is to ignore the complexity of Kirkpatrick's scheme. If the [Respondent's] allegations are true, a European conglomerate, and two American corporations—successfully, and over a two-year period—organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829

F.2d 1263, 1268 (3rd Cir. 1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Barticheck's* specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the statute.... *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063-1064 (3d Cir. 1988).

In the face of this fact-bound analysis of the racketeering activity in this commercial transaction with Nigeria, and notwithstanding the scope and number of corporations and persons involved, the instant Petition requests this Court to grant *certiorari* and reverse the court below by ruling, consistently with the most niggardly possible reading of the RICO statute and its "pattern" requirement, that a person damaged by racketeering activity may maintain a civil action against his wrongdoer only if the complaint "alleges multiple separate criminal schemes or episodes" (Petition, p. 11).[16] This reading of the RICO statute and its "pattern" requirement, while finding appellate favor with the Eighth Circuit, the Circuit as to which this Court has already granted *certiorari*, has been rejected by the court below and most other courts and commentators. Hence, this Court need not grant *certiorari* in the instant case; it need only—as it should—reverse the Eighth Circuit's narrow reading of the RICO pattern requirement and

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16. Of course, paragraph 57 of the instant complaint alleges multiple separate criminal schemes and episodes by these same Petitioners as follows:

> ... the affairs of the [Defendants'] enterprises were also conducted through a pattern of racketeering activities ... in that [a Defendant] had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian contract ...". (A. 111)

adopt as its own the highly fact-bound analysis of "pattern" and the subsidiary issues of "continuity" and "relatedness" developed and articulated by the Third Circuit in the light of the authorities cited above. As this Court noted in quoting from 18 U.S.C. §3575(e) in footnote 14 of the *Sedima* opinion:

> . . . criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 105 S.Ct. at 3285.

Here, the unlawful conduct by these Petitioners consisted of repeated acts of bribery having the same purposes, participants, victims, method of commission and results; the acts of these Petitioners as set forth in the pleadings below are plainly not "isolated" events—they constitute a "pattern of racketeering activity".

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should refuse the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit in this matter.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the act of state doctrine bars judicial inquiry into whether the award by the Nigerian Government of a military construction contract was caused by the payment of bribes to Nigerian officials.

2. Whether plaintiff alleged a "pattern of racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968 (1982 & Supp. V 1987).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2066

W.S. KIRKPATRICK & CO., INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondent, a Pennsylvania corporation, is the disappointed bidder on a construction contract awarded by the Federal Republic of Nigeria. A subsidiary of petitioner W.S. Kirkpatrick, Inc., a New Jersey corporation, was the successful bidder. Respondent alleges that Kirkpatrick obtained the contract by bribing officials of the Nigerian Government. Respondent seeks to recover damages from Kirkpatrick and the other petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968 (1982 & Supp. V 1987); Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13 (c); and the New Jersey Anti-Racketeering Act, N.J. Stat. Ann. §§ 41-1 to 41-6.2 (West 1982).

1. In 1980, defendant Harry Carpenter, Kirkpatrick's Chairman and Chief Executive Officer, learned that the Nigerian Government was interested in constructing and

equipping an aeromedical center for the Nigerian Air Force.[1] Carpenter hired a Nigerian national, defendant Benson "Tunde" Akindele, to act as Kirkpatrick's local agent in procuring the contract. According to a March 1981 memorandum, Akindele informed Carpenter that Kirkpatrick should be prepared to pay a "sales commission" totalling 20% of the contract price to Nigerian political and military officials. Akindele stated that Nigerian officials generally expected such payments from bidders and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.[2] Ultimately, Kirkpatrick and Akindele entered into a written agreement providing that, upon successful award of the contract, Kirkpatrick would pay a commission to two Panamanian corporations established by Akindele to receive and distribute the commission to the relevant Nigerian officials. Eventually, both respondent and Kirkpatrick submitted bids, and the contract was awarded to a subsidiary of Kirkpatrick on March 19, 1982. On four occasions in 1982 and 1983, the Nigerian Government made payments under the contract to Kirkpatrick. On each occasion, Kirkpatrick paid the promised "commission" to Akindele's Panamanian corporations, which then distributed the monies. Kirkpatrick paid more than $1.7 million in "commissions" under this arrangement. Pet. App. A4-A6, A42-A43.

In April 1983, respondent learned that its bid had been far lower than Kirkpatrick's. After investigating the matter, respondent reported its findings to the Nigerian Air Force and the United States Embassy in Lagos. Ul-

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[1] The statement of facts in the text is taken from the opinions below, which are based on the allegations in the complaint. See Pet. App. A4 n.1.

[2] As alleged in respondent's amended complaint, the 20% commission was to be distributed as follows: 2½% to Akindele, 5% for the Nigerian Air Force, 2½% for the medical group, 5% for a political party, 2½% for the relevant cabinet minister, and 2½% for other key defense personnel. Pet. App. A5 n.3.

timately, Carpenter and Kirkpatrick pleaded guilty to one count of violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-2. In connection with their pleas, Carpenter and Kirkpatrick stipulated to an offer of proof that outlined the agreement between Carpenter and Akindele and the payments to the Panamanian corporations, but did not state that money had actually been paid to Nigerian officials. Carpenter was sentenced to 200 hours of community service and fined $10,000; Kirkpatrick was fined $75,000, payable over a five-year period. Pet. App. A6-A7, A43-A44.[3]

2. a. Respondent then brought this suit seeking to recover damages from Kirkpatrick and the other petitioners for its loss of the contract. Petitioners moved to dismiss the complaint on the ground, *inter alia*, that the suit is barred by the act of state doctrine. Before ruling on that defense, the district court requested the views of the Department of State. The Legal Adviser responded by letter dated December 10, 1986. He informed the court that the United States had taken the position in its amicus briefs in *Mitsui & Co.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980), and *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977), that inquiries into the motivation (as distinguished from the validity) of the official acts of a foreign sovereign are not barred by the act of state doctrine (Pet. App. A34-A37). Quoting those briefs, he explained (*id.* at A35 (emphasis in letter)):

> "[W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions . . . .
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> None of this Court's decisions suggests that the act of state doctrine precludes all judicial inquiries that

[3] At Kirkpatrick's sentencing, the Assistant United States Attorney informed the court that the State Department was concerned about the possible impact on the Nigerian Government if the grand jury disclosed information about who might have received the payments, since some officials named were prominent military figures who were still in power (Pet. App. A43-A44).

> may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied."

Adhering to this view, and based on his understanding that "the validity of the Nigerian Government's decision to award the contract * * * is not in question," the Legal Adviser stated that the act of state doctrine would not bar the court "from adjudicating this dispute," even though it might entail an inquiry into the Nigerian Government's motivations in awarding the contract (Pet. App. A36). He cautioned, however, that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." He therefore urged the district court "to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." *Ibid.*[4]

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[4] Counsel for respondent communicated with the Nigerian Embassy in Washington, requesting a declaration "that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America" (Pet. App. A45). The Nigerian Government did not respond to that letter; nor, apparently, has it repudiated the contract or taken any other action in response to the allegations (*id.* at A45, A62 n.14).

b. After receiving the Legal Adviser's letter, the district court dismissed respondent's suit (Pet. App. A38-A73), holding that it is barred by the act of state doctrine (*id.* at A53-A66). In the court's view, the act of state doctrine applies whenever a suit would require judicial investigation of the acts of a foreign government or might interfere with the conduct of foreign policy by the Executive Branch (*id.* at A53-A55, A58). It found both of those defects here.

First, the court noted that in order to prevail, respondent must demonstrate that petitioners "intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, [respondent] would have been awarded the Nigerian Contract" (Pet. App. A55-A56). Because "an indispensable ingredient of [respondent's] cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law," the court believed it would "question[]," either "directly or collaterally," the acts of a foreign sovereign (*id.* at A57-A58; *see also id.* at A60, A64-A65). Second, the court believed such an inquiry might embarrass the political branches, or at least make the conduct of the United States' relations with Nigeria more difficult, by inquiring into and impugning the integrity of decisions of Nigerian officials (*id.* at A55, A56, A58, A60, A64-A65).

The court also rejected respondent's contentions that it could properly "inquire as to the motivation, rather than the validity, of the questioned activities" (Pet. App. A-58-A59) and that the prosecutions of Carpenter and Kirkpatrick under the FCPA established an exception to the act of state doctrine in the circumstances of this case (*id.* at A61-A62). On the latter point, the court found it significant that the offer of proof in the FCPA case was

carefully worded and did not establish that bribes had actually been paid to Nigerian officials (*id.* at A62).

Finally, the court held that the Legal Adviser's letter did not bring this case within the "*Bernstein* exception" to the act of state doctrine, which may be invoked where the Executive Branch represents that application of the doctrine would not advance the interests of United States foreign policy (Pet. App. A62-A65).[5] The court reasoned that although the Legal Adviser took the position that the act of state doctrine is inapplicable in this case, he acknowledged that "inquiries into the motivation and validity of actions by foreign states * * * may seriously affect United States foreign relations" (*id.* at A63). The court rejected the Legal Adviser's suggestion that it should entertain the suit but "conduct the litigation with an eye to foreign policy concerns," because, in its view, that approach would violate the primacy of the Executive Branch in foreign affairs (*id.* at A63-A64).

3. a. The court of appeals reversed (Pet. App. A1-A37). It acknowledged that the award of a military procurement contract can be a sufficiently formal expression of sovereign interests to trigger the act of state doctrine and that such an award does not fall within any exception for ministerial or "commercial" acts, since it may involve national security considerations that "are far from routine" (*id.* at A12-A13). But the court held the act of state doctrine inapplicable for other reasons (*id.* at A13-A21). In its view, "the district court's dismissal

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[5] See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), three Justices took the position that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts" (*id.* at 768) (opinion of Rehnquist, J.)). Justice Powell, in his concurring opinion (*id.* at 773), and Justice Brennan, in his dissenting opinion for four Justices (*id.* at 776-777, 782-793), rejected the recognition of a "*Bernstein* exception." See also *id.* at 773 (Douglas, J., concurring).

was based on little more than speculation about the effect that [respondent's] lawsuit might have on relations between the United States and Nigeria," since "[t]he traditional justification for involving [*sic*] the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case" (*id.* at A17). The court noted in this regard that respondent did not seek to have the contract invalidated or to recover damages from the Nigerian Government or any of its officials, and "the district court would be called upon simply to determine as a factual matter whether [Kirkpatrick's] alleged bribery of Nigerian officials motivated the award of the contract" (*id.* at A17-A18).

The court of appeals accordingly rejected what it termed the "expansive interpretation" of the act of state doctrine by the Ninth Circuit in *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 407 (1983), cert. denied, 464 U.S. 1040 (1984), which held that judicial inquiry into whether bribery caused a foreign sovereign act was barred because it would "impugn or question the nobility of a foreign nation's motivation" (Pet. App. A15). In the court's view, the doctrine should not "allow litigants to shield themselves from the consequences of illegal conduct abroad" and should not "in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government" (*id.* at A16). The court found support for this view in the Legal Adviser's letter, finding that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of [respondent's] lawsuit" (*id.* at A19).[6]

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[6] The court read the Legal Adviser's suggestion that the district court exercise "caution and due regard for foreign sensibilities" as a "reminder" that "[f]oreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules" and that courts should "exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities" (Pet. App. A19-A20 n.11).

b. The court of appeals also held that respondent had alleged a "pattern of racketeering activity" within the meaning of the RICO statute and the parallel state anti-racketeering statute (Pet. App. A22-A24). It concluded that "allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity," depending upon such factors as "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity" (*id.* at A22).

DISCUSSION

The decision of the court of appeals in this case squarely conflicts with the Ninth Circuit's holding in *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (1983), cert. denied, 464 U.S. 1040 (1984), that the act of state doctrine bars judicial inquiry into whether a foreign sovereign act was motivated by a bribe. Questions concerning the extent (if any) to which the act of state doctrine bars United States courts from ascertaining the motivation for the official acts of foreign governments are important and recurring. We also believe that the lower courts would benefit from guidance by this Court about the contours and bases of the act of state doctrine, in light of the splintered decisions in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), and *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976), and the passage of 13 years since the latter ruling. Review by this Court is therefore warranted.

We have twice before urged the Court to grant certiorari to consider application of the act of state doctrine in cases involving an inquiry into the motivations behind a foreign sovereign act, but the Court denied review in both cases. *Mitsui & Co.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980); *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977). Earlier this Term, the Court again denied certiorari in a case in which the

petitioner sought to raise these issues. *O.N.E. Shipping, Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 109 S. Ct. 303 (1988). In that case, however, we urged the Court to deny review primarily because the factual and legal context of the case was murky and because it was unclear whether, or to what extent, a judicial inquiry into the motivations of foreign officials would actually be required.[7]

This case presents no such difficulties: the allegations in the complaint are straightforward; they clearly present the act of state issue; and they do so in a not atypical factual context (alleged bribery) that fully and starkly illuminates a number of the competing considerations. This case therefore presents an appropriate occasion for the Court to revisit the act of state doctrine.

We took the position in our briefs in *Mitsui*, *Hunt* and *O.N.E. Shipping* that the act of state doctrine does not ordinarily bar judicial inquiry into the motivation, as such, for a foreign sovereign act; the Legal Adviser reiterated that position in his letter to the district court in this case. That continues to be our view as a general matter. Nevertheless, in connection with the instant case, the Department of Justice and the Department of State have undertaken a review of a number of aspects of the act of state doctrine. That review is not complete. Accordingly, at this stage of the case, we shall limit ourselves to a discussion of the background of the issues raised and some of the factors that may have a bearing on the Court's (and the parties') consideration of those issues. If the Court grants the petition, we will file a brief at the merits stage setting forth the concluded view of the United States.

Petitioners also seek review of the court of appeals' holding that respondent sufficiently alleged a "pattern of racketeering activity" within the meaning of the RICO statute. The meaning of that statutory requirement is before the Court in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252, in which oral argument was held

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[7] We have furnished counsel for the parties with copies of our brief in *O.N.E. Shipping*.

on November 8, 1988. There is, accordingly, no reason for the Court to grant plenary review on that question here.[8] Instead we suggest that the Court hold the petition with respect to Question 2 until it finally disposes of Question 1, and that it then dispose of the petition as to Question 2 as appropriate in light of *H.J. Inc.* The act of state issues will not be mooted even if the Court's decision in *H.J. Inc.* should require that respondent's RICO and state-law racketeering claims be dismissed, because the act of state issues are also raised by respondent's claim under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c).[9]

1. The "classic" formulation of the act of state doctrine is set forth in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Put another way, the doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See also *Alfred*

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[8] We take the position in *H.J. Inc.* that a "pattern of racketeering activity" does not require multiple separate schemes, and that a pattern is present if the defendant's acts are not isolated or sporadic. We have furnished the parties in this case with a copy of our brief in *H.J. Inc.*

[9] Petitioners do not challenge the court of appeals' holding (Pet. App. A29-A30) that respondent has stated an actionable violation of Section 2(c) of the Robinson-Patman Act. See also *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Rangen* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966) (cited in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

Dunhill, 425 U.S. at 706 (opinion of White, J.). The act of state doctrine thus respects principles of sovereignty and international comity and, where applicable, operates as a choice-of-law principle supplying the appropriate rule of decision in cases in which the validity of the act of a foreign sovereign is questioned in United States courts. See *Sabbatino*, 376 U.S. at 418; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). More recently, the doctrine has been thought to derive as well from the separation of powers under the Constitution, reflecting a "policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch * * * in the conduct of foreign relations," and "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Alfred Dunhill*, 425 U.S. at 697 (opinion of White, J.); *Sabbatino*, 376 U.S. at 427-428, 431-433.

As is evident from these pronouncements, the act of state doctrine has rather limited contours. It does not ordinarily require dismissal of a suit merely because the litigation touches upon foreign relations concerns.[10] In fact, the doctrine is a rather narrow exception to the general duty of courts to adjudicate cases otherwise properly before them. See *Sharon* v. *Time*, 599 F. Supp. 538, 553 (S.D.N.Y. 1984); Restatement (Third) of Foreign Relations Law § 443 (1987). Despite the seemingly absolute nature of the doctrine as formulated in *Underhill*, this Court has declined to lay down an "inflexible and all-encompassing" rule (*Sabbatino*, 376 U.S. at 428; accord *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355, 1360-1361 (9th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1933 (1989)), and in *First National City Bank*

[10] For example, in *Sabbatino* itself, the act of state doctrine did not require dismissal of the suit, but only that the expropriation of property in that case be given effect as the rule of decision. See 376 U.S. at 428-437.

and *Alfred Dunhill*, it permitted judicial inquiry into the validity of the act of a foreign sovereign where that result was consistent with related legal principles or the underlying purposes of the doctrine. On the other hand, because it is based on the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations" (*Sabbatino*, 376 U.S. at 423), the act of state doctrine, where it applies, requires judicial abstention, despite the resulting hardship upon individual litigants whose otherwise potentially meritorious claims cannot be adjudicated in United States courts.

2. a. The lower courts have been divided over the application of the act of state doctrine in cases that may involve a judicial inquiry into the motivation of a foreign state and its agents. The courts have found such an inquiry to be barred in some cases. *Clayco, supra; Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972). In others, including the decision below, such an inquiry has been permitted. *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), cert. denied, 464 U.S. 849 (1983); *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). See also Restatement (Third) of Foreign Relations Law § 443, reporter's note 7, at 379-80 (1987).

We recognize that the results in some of the cases might be reconciled—*e.g.*, on the ground that inquiry has been barred where the act of the foreign sovereign was itself the direct or immediate cause of the injury, rather than merely part of the context in which essentially private conduct caused the injury (see *Clayco*, 712 F.2d at 407 (distinguishing *Mitsui* on this basis)), or

that the nature of the inquiry into motivation was such that it necessarily would implicate validity (see *Hunt*, 550 F.2d at 77). Even so, the lower courts remain uncertain and varied in their analytical approaches to deciding whether "motivation" is a proper subject of inquiry.

To some extent, the divergence in approach may reflect differing views of the underpinnings and primary focus of the act of state doctrine. For example, if a court emphasizes the choice-of-law aspects of the doctrine,[11] it may be disposed to consider only whether the act of the foreign state will either be given effect or held invalid as a formal matter, and to regard a judicial inquiry into the reasons *why* the foreign government took the actions it did (*e.g.*, because of corruption or pressure exerted by private parties, rather than because of distinctly governmental or sovereign interests) as largely beyond the concern of the act of state doctrine. On the other hand, if a court emphasizes the separation-of-powers aspects of the doctrine, it may be disposed to ask whether the Executive Branch's conduct of the Nation's foreign relations would be embarrassed by adjudication of the particular case, and thus to be concerned about whether a foreign government would be offended by litigation in United States courts that might expose its decision-making to scrutiny or impugn its integrity.

b. The tension between these two visions of the act of state doctrine is exacerbated in the present context by the uncertain relationship among this Court's decisions in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *American Banana*, the Court, in an opinion by Justice Holmes, affirmed the dismissal of a private antitrust suit alleging that the defendant had caused the government of Costa Rica to seize the plaintiff's property (a banana planta-

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[11] See, *e.g.*, Leigh & Sandler, Dunhill: *Toward a Reconsideration* of Sabbatino, 16 Va. J. Int'l L. 685, 709-718 (1976).

tion) for the purpose of eliminating it as a competitor. The Court first held that the antitrust laws did not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions. See *Continental Ore*, 370 U.S. at 704-705. However, the Court also relied on act of state principles (213 U.S. at 357-359):

> The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. *Underhill* v. *Hernandez*, 168 U.S. 250.
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> The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.
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> * * * As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. * * * A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Sisal Sales was an injunctive action alleging that the defendants had conspired in the United States to monopolize and restrain trade in sisal by, *inter alia*, securing passage of favorable legislation by the Government of Mexico. In holding that the complaint stated a valid claim for relief, the Court distinguished *American Ba-*

nana as involving "acts done outside the United States and not unlawful by the law of the place" (274 U.S. at 276). By contrast, in *Sisal Sales*, "[t]he United States complain[ed] of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties" (*ibid.*). Although "the conspirators were aided by discriminating legislation," they were "within the jurisdiction of our courts and [could] be punished for offenses against our laws" (*ibid.*).

Finally, in *Continental Ore*, the defendants had conspired in the United States to establish an exclusionary customer-allocation program for sales of vanadium in Canada by utilizing the authority of a wholly owned subsidiary of one of the defendants as the exclusive purchasing agent for the Canadian government. In upholding the claim, this Court analogized the case to *Sisal*, again distinguishing *American Banana* (370 U.S. at 705 & n.13), and continued (*id.* at 706):

> In the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government or by its Metals Controller. * * * As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

This Court has never clarified the extent to which the holding of *American Banana* survives *Sisal Sales* and *Continental Ore*, although in *Sabbatino* the Court referred to *American Banana* as one of several decisions "directly or peripherally" involving the act of state doctrine that did not "manifest any retreat from *Underhill*" (376 U.S. at 416).[12] It is unclear, for example, to what

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[12] The lower courts have generally concluded that the holding of *American Banana* has survived *Sisal* and *Continental Ore*, although they have sometimes distinguished *American Banana* and found the act of state doctrine inapplicable in the particular case. Compare *Mitsui*, 594 F.2d at 52-54 (doctrine inapplicable), with *Hunt*, 550

extent *American Banana* should now be viewed as turning primarily on the supposed inapplicability of the antitrust laws to actions occurring outside the United States, the apparent absence of unlawful conduct within the jurisdiction of the United States, and the fact that the expropriation was the immediate cause of the injury to the plaintiff. The mix of these factors was obviously different from those in *Sisal Sales* and *Continental Ore*, where an act of a foreign government was not so central to the unlawful scheme and was not so directly the cause of the injury to the plaintiff, and where there was less reason to suppose that the foreign government had effectively ratified the defendants' conduct.

3. In response to the Court's invitation in the *Hunt* and *Mitsui* cases, the United States expressed the view—which is quoted at pages 3-4, *supra*, and in the Legal Adviser's letter to the district court (Pet. App. A34-A35)—that the act of state doctrine does not ordinarily bar inquiry into the reasons why a foreign government took the action in question. Although we have not reached a concluded view on the point in the circumstances of this case, that continues to be our view as a general matter at this time, at least where the Executive Branch believes that the adjudication would be consistent with the foreign relations interests of the United States. See *First National City Bank*, 406 U.S. at 768 (opinion of Rehnquist, J.). It is useful to bear in mind, however, the somewhat different factual and legal contexts in which the issue may arise.

Cases in which the motives of a foreign government or its agents are implicated have involved the revocation of a license under local law (*Mitsui* and *Mannington Mills*); military contract procurement decisions (*Northrop Corp.* and *Williams*); the expropriation of property or seizure of territory (*Hunt* and *Buttes Gas & Oil*); and the institution of judicial proceedings (*Timberlane Lumber*).

F.2d at 73-75 (doctrine applicable), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. at 109-110 (same).

Further, the relationship of the question of "motivation" to the issues presented has varied considerably, depending upon the nature of the claims and defenses, the source and content of the applicable law, and the underlying facts. Such a wide array of factual and legal contexts may counsel against a single, inflexible rule as to when (if ever) inquiry into the cause of a foreign government's acts should be barred by the act of state doctrine.

For example, it seems clear that in *Mitsui*, the act of state doctrine properly did not bar adjudication of the plaintiff's claim that private defendants conspired to monopolize the lumber export industry in Indonesia by causing plaintiff's joint venture to fail under local law, which resulted in the automatic revocation of a previously issued license under that same law, neutrally applied. To resolve the liability issues, the court was not required to inquire into the validity of the foreign sovereign's act, or even to resolve any questions concerning the motivation of the officials who revoked the license (see 594 F.2d at 53-55), and there was no reason why an official act of a foreign government should have insulated the defendants from liability that was the immediate and foreseeable consequence of their unlawful conduct. As in *Continental Ore*, the involvement by agents of the foreign government was little more than the context in which the unlawful conduct occurred. By contrast, in *Hunt*, the legality of the challenged expropriation as a matter of international law would have turned in part on whether it was an act of political retaliation and economic coercion. A judicial inquiry into the purposes of the expropriation therefore would necessarily have implicated its validity as a matter of international law. See 550 F.2d at 77.

4. For the foregoing reasons, the application of the act of state doctrine presents difficult questions when the conduct of the foreign state or its agents combines with the conduct of private parties to injure the plaintiff. In that context, the act of state doctrine, as a narrow exception to a court's general "duty to adjudicate" (*Sharon*

v. *Time*, 599 F. Supp. at 553), must be applied with circumspection, so as not lightly to deprive individual litigants of their "day in court."

In the present case, the court of appeals rejected what it regarded as the "expansive interpretation" of the act of state doctrine in *Clayco*, which held that judicial inquiry into whether a foreign sovereign act resulted from a bribe was barred because it would " 'impugn or question the nobility of a foreign nation's motivation' " (Pet. App. A15; see 712 F.2d at 407). The court below then concluded, with little supporting analysis, that the act of state doctrine should not bar further proceedings in this case because "adjudicating [respondent's] claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts." Pet. App. A21.[13] However, even if the court below properly concluded that a judicial reluctance to impugn the integrity of a foreign government's decision-making does not alone trigger the act of state doctrine, it would not necessarily follow that the doctrine is altogether inapplicable in the circumstances of this case. The court below was of course correct that a decision in favor of respondent would not require the district court formally to declare the Nigerian contract invalid as a matter of Nigerian law. But as the district court pointed out (Pet. App. A55-A56), a necessary element of respondent's case is proof that the payment or promise of a bribe was the "but for" cause of the con-

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[13] In the circumstances of this case, there is considerable force to the conclusion by both courts below that the decision to award a military procurement contract—a decision that is often "influenced by national security considerations"—is a sufficiently "official" expression of a state's "public" interests to warrant application of the act of state doctrine. Pet. App. A12-A13, A57. See *Williams* v. *Curtiss-Wright*, 694 F.2d at 302; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d at 1048. Compare *Remington Rand Corp.-Delaware* v. *Business Systems, Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987) (act of foreign bankruptcy trustee not act of state); *Maunlington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979) (issuance of foreign patent not act of state).

tract award,[14] and such proof may in turn have some bearing on the validity of the contract.

As the parties and the courts below noted, Nigeria, like most nations, makes bribery of a public official in return for performance of an official act illegal. See Decree No. 38, §§ 1-3 (Nov. 22, 1975) *reprinted in* 62 Federal Republic of Nigeria Official Gazette, No. 59 (Dec. 2, 1975).[15] See also H.H. Marshall, *The Laws of Northern Nigeria*, cap. 89, ch. X, §§ 115-122 (1965); D. Kingdon, *The Laws of the Federation of Nigeria and Lagos*, Criminal Code, cap. 42, ch. XII, §§ 98-104 (1958); cf. 18 U.S.C. 201 (1982 & Supp. V 1987). Under accepted common law principles in this country, an agreement (such as that between Carpenter and Akindele) to use improper influence to procure a government benefit is illegal as contrary to public policy.[16] Furthermore, applying similar common law principles, the courts have held that the violation by a public official of a criminal statute making it illegal for him to have an interest in a government contract renders that contract void, or at least voidable at the instance of the government.[17]

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[14] See 18 U.S.C. 1964(c), 1962(b), (c), 1961(1)(A) (1982 & Supp. V 1987); cf. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-660 (1960); see also Pet. App. A56.

[15] The Decree provides that "any gratification" received by a government employee from "a person or agent of a person who has or seeks to have any dealing with the Government" is presumed "to have been paid or given and received corruptly as an inducement or reward * * * unless the contrary is proved" (*id.* § 4).

[16] *Crocker* v. *United States*, 240 U.S. 74 (1916); *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906); *Oscanyan* v. *Arms Co.*, 103 U.S. 261 (1880); *Meguire* v. *Corwine*, 101 U.S. 108 (1879); *Trist* v. *Child*, 88 U.S. (21 Wall.) 441 (1874); *Tool Co.* v. *Norris*, 69 U.S. (2 Wall.) 45 (1864). See also *Montefiore* v. *Menday Motor Components Co.*, 87 L.J.K.B. 907, 909 (1918); *Waldo* v. *Martin*, 107 Eng. Rep. 1078, 1080 (1825); *Morris* v. *MacCullock*, 28 Eng. Rep. 870, 871 (1763).

[17] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563-566 (1961); *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 500 (1927); *Crocker* v. *United States*, 240 U.S. at 81; *Burck* v. *Taylor*, 152 U.S. 634 (1894);

Nigerian law may also declare that a government contract obtained by bribery is invalid, at least at the option of the government.[18]

Thus, an adjudication by a United States court that a contract was awarded by a foreign government because of the payment or award of a bribe—*i.e.*, that the bribe was the "motivation" for the award—may often establish facts necessary to render the award illegal under the law of the foreign state and to render the contract itself voidable or void as a result.[19] However, it does not necessarily follow that this consequence would trigger application of the act of state doctrine or, if it did, that an exception or modification of that doctrine would be inappropriate. It may be argued, for example, that the

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Miller v. *Ammon*, 145 U.S. 421 (1892); *Bank of the United States* v. *Owens*, 27 U.S. (2 Pet.) 527 (1829). See also *City of London Electric Lighting Co.* v. *Mayor of London*, [1903] App. Cas. 434 (H.L.(E.)), aff'g [1901] 1 Ch. 602, 613 (Rigby, L.J.); *Meliss* v. *Shirley & Freemantle Local Board of Health*, 16 Q.B.D. 446, 451-452 (1885).

[18] Nigeria is a former British colony, and its law is broadly based upon English common law principles. See T. Elias, *The Nigerian Legal System* 12, 17-21, 214 (1963) ("principles governing * * * [Nigerian] cases on contract * * * are * * * broadly the same as those of English law"); see also *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. 220, 232 (Nigeria Sup. Ct.). Relying on English precedents, Nigerian courts have held that a contract to use improper influence to procure a government benefit (such as a government contract) is illegal as contrary to public policy. *Koko* v. *Page Communications Engineers Inc.*, [1975] N.C.L.R. 149, 156-157 (Lagos High Ct.). See also O. Achike, *Nigerian Law of Contract* 179 (1972). Similarly, Nigerian courts have held that illegality renders a contract invalid. *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. at 229, 232-236. See also *George* v. *Dominion Flour Mills Ltd.*, [1963] 1 All N.L.R. 71, 73-74 (Fed. Sup. Ct.).

[19] A United States court might even distinguish between a void contract and a voidable contract for these purposes. It could conclude, for example, that unless the foreign government formally repudiates the contract, it should be regarded as valid, notwithstanding an adjudication by a United States court that an officer of the foreign government awarded the contract only because he received a bribe.

fact that bribery is illegal under the law of Nigeria distinguishes this case from *American Banana*, where the efforts to obtain passage of the expropriation legislation were presumed to be lawful under the law of Costa Rica. See 213 U.S. at 357-358; see also *Sisal Sales*, 274 U.S. at 276, quoting *American Banana*, 213 U.S. at 359 (emphasis added) ("'A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, *if they are permitted by the local law.*'"). Because the general laws of the United States and Nigeria are in agreement regarding the illegality of bribes made to public officials (cf. *Sabbatino*, 376 U.S. at 428), it could be argued that proof of such a bribe as an element of a cause of action arising under the laws of the United States would not necessarily demonstrate the sort of disrespect for another sovereign that has concerned the courts in other settings.[20]

The Court might also take into account the fact that because both Nigerian citizens and United States citizens were parties to the allegedly unlawful transaction in this case, any interests of the Nigerian Government that may be safeguarded by the act of state doctrine by virtue of the performance by its officials of public acts must be weighed against the interests of the United States in reg-

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[20] In *Sabbatino*, the Court held that the Cuban expropriation decree could not be challenged on the ground that it was not issued in conformity with Cuban law. The Court concluded that the act of state doctrine bars a United States court from inquiring into the validity of an act of an official of a foreign state under the law of that state, because such an inquiry "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question" (376 U.S. at 415 n.17). In this case, by contrast, respondent does not ask the courts below to find either the alleged payment of bribes to Nigerian officials or the award of the contract to Kirkpatrick rather than respondent unlawful as a matter of Nigerian law. Respondent contends, rather, that it was injured as a result of petitioners' violation of United States law. We suggest in the text only that a court might be permitted to adjudicate the alleged violation of United States law because the type of conduct on which the violation is premised—the bribery of public officials—is also a violation of Nigerian law.

ulating the conduct of its citizens who engage in the foreign commerce of the United States. A relevant consideration in this regard is that Congress, in the FCPA, has made it a criminal offense for a United States national to offer a bribe to a foreign official in order to obtain a contract and has authorized the Attorney General and Securities Exchange Commission to seek injunctive relief or civil penalties (15 U.S.C. 78dd-1 and 78dd-2, as amended by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, Tit. V, Subtit. A, Pt. I, 102 Stat. 1415)—thereby contemplating that such conduct may properly be the subject of inquiry by United States courts in some circumstances.[21] On the other hand, the judicial proceedings expressly authorized by the FCPA remain under the control of the United States Government, which preserves an opportunity for the Executive Branch to prevent any undue embarrassment to foreign relations. In the absence of additional procedures, the Executive Branch does not have the same opportunity where, as here, the litigation is instituted by private parties. See *Clayco*, 712 F.2d at 409.

5. We do not propose a definitive resolution of the foregoing issues and possible analytical approaches at this time. We merely identify them now, in anticipation of the occasion for a comprehensive consideration of the underpinnings and proper focus of the act of state doctrine in this setting if the Court grants review.

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[21] *Sage Int'l* v. *Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979); contra *Clayco*, 712 F.2d at 409. See also Note, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases*, 59 Notre Dame L. Rev. 455 (1984); Note, Clayco Petroleum Corp. *v.* Occidental Petroleum Corp.: *Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L. J. 407 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question 1. With respect to Question 2, the petition should be held and disposed of as appropriate in light of the Court's decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252 (argued Nov. 8, 1988).

Respectfully submitted.

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CLERK

No. 87-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed June 17, 1988
Certiorari Granted June 26, 1989

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A-3

PLAINTIFFS

ENVIRONMENTAL TECTONICS

DEFENDANTS

W.S. KIRKPATRICK INC., DEVELOPMENT INTERNATIONAL CORPORATION, DIC (HOLDING, Inc., IDC INTERNATIONAL S.A. LUXEMBOURG, HARRY G. CARPENTER c/o W.S. Kirkpatrik, Inc.
and
BENSON "TUNDE" AKINDELE

JOHN M. KRANKEL, EMRO ENGINEERING CO., INC. ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC., ROSS E. SAXON c/o NAUTILUS ENVIRONMENTAL SYSTEMS, INC. & R.H. EDWARDS

Other contract. LDD

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

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John M. Krankel

JS6 5-6-87

DATE	NR.	PROCEEDINGS
-4-86	1	Complaint, fld 2-26-86.
-4-86		Summons issued (20 days) as to WS Kirkpatrick Inc. & Harry G. Carpenter
-4-86		Summons issued (35 days) as to Development Intern'l, DIC Inc., IDC international [sic]* and Benson Akindele.
-4-86	2	Notice of allocation and assignment fld. (Newark-Stern).

* This Appendix is an exact reproduction of the documents as they appear in the Court record; the typographical errors have not been noted.

-17-86	3	Notice of motion by plaintiff for an order directing certain accelerated discovery, ret. 3-14-86 and proof of service, fld. 3-14-86. (Brief submitted)
-31-86	4	Notice of motion by plaintiff to admit Thomas B. Rutter, Esq. pro hac vice, ret. 4-28-86, statement in lieu of brief and proof of service fld.
-14-86	5	Notice and acknowledgment of receipt of summons & complaint on deft. W. S. Kirpatrick, Inc. 4-4-86, fld.
-14-86	6	Clerk's order extending time of deft. Harry G. Carpenter to answer to May 9, 1986, fld. N/M
-21-86	7	Stipulation and order extending tiem of deft. W.S. Kirpatrick Inc. to answer to May 5, 1986 and defts. Development International Corp. and DIC Holdiing Inc. to answer to May 19, 1986, fld. (Stern) N/M
-28-86	8	Order admitting Thomas B. Rutter, Esq. pro hac vice on behalf of pltf., fld. (Hedges) N/M
-2-86		At call for hearing on plaintiff's motion to admit Thomas B. Rueter, Esq. pro hac vice. Court indicated motion to be decided pursuant to Rule 78. (Hedges) (4-28-86)
5-6-86	9	Order re discovery: scheduling deposition; granting plaintiff leave to file an amended complaint, etc., fld. (Hedges) N/M

5-8-86	10	Notice and acknowledgment of receipt of summons & complaint on deft. Harry G. Carpenter on 4-9-86, fld.
5-13-86	11	Notice of motion by defts. Development Industrial Corporation and DIC (Holding) Inc. to dismiss complaint, ret. 6-9-86 and proof of service, fld. (Brief submitted)
5-13-86	12	Notice of motion by deft. W.S. Kirkpatrick & Co. Inc. to dismiss complaint, ret. 6-9-86 and proof of service, fld. (Brief submitted)
5-15-86	13	Protective order re confidentially of certain documents, etc., fld. (Hedges) N/M
5-16-86	14	Order directing Rhonda Orin, Esq. to supply to counsel for pltf by May 16, 1986 address of deft. IDC International S.A. Luxembourg for service of process in the United States, etc., fld. 5-15-86. (Hedges) N/M
5-19-86	15	Notice of appearance on behalf of plaintiff, fld.
5-22-86	16	Order re confidentially of certain information, etc., fld. (Hedges) N/M
6-2-86	17	Order admitting Thomas H. Sear and Rhonda D. Orin pro hac vice on behalf of defts. W.S. Kirkpatrick & Co., Inc. Development Industrial Corporation and DIC (Holding) Inc., scheduling a status conference on July 18, 1986 at 9:00 A.M., etc., fld. 5-30-86 (Hedges) N/M

6-3-86	18	Notice of motion by attorney for deft. Harry G. Carpenter to join in motion of deft. W.S. Kirkpatrick & Co., Inc. for an order dismissing the complaint, ret. 6-9-86 and proof of service, fld. (Brief previously submitted)
6-6-86	19	Certification of Rhonda D. Orin, fld.
6-6-86	20	Certification of Thomas H. Sear, fld.
6-10-86	21	Order re discovery; directing deposition of deft. Harry G. Carpenter to be completee by June 30, 1986; defts' pending motions to dismiss shall be ret. Aug. 5, 1986, etc., fld. (Hedges) N/M
7-9-86	22	Order cancelling deposition of Robert H. Edwards for 7-3-86 & re-scheduling it for 7-10-86; vacating paragraph 2 of this Court's Order of 6-10-86; directing pltf. to file an amended complt., etc., fld 7-7-86. (Hedges) N/M.
7-16-86	-	Order re-assigning case from Judge Stern to Judge Lechner, filed. (Fisher) (See Civil 80-187)
7-18-86	23	AMENDED COMPLT, fld. 7-14-86.***
7-18-86		Summons on amended complt. as to defts., W.S. Kirkpatrick Inc., Development Int'l Corp., Int'l Dev. Corp., Harry G. Carpenter & Benson "Tunde" Akindele, issued. (10 days)
7-18-86		Summons on amended complt. as to defts., John M. Krankel, Emro Engineering Co. Inc., Robert W. Ruppert, & R.H. Edwards, issued. (20 days)

7-18-86		Summons on amended complt. as to deft., Ross E. Saxon, issued. (35 days)
7-21-86	24	Letter-Order & Opinion re deponent Carpenter shall not be compelled to testify, etc., fld. 7-17-86 (Hedges) n/m
7-22-86	25	Notice of motion of pltf., for an order unsealing the amended complt etc., ret. 8-5-86 & cert. of service, fld. 7-21-86 (brief sub)
7-28-86	26	Notice of motion of pltf. to appeal the Order of Mag. Hedges of 7-16-86, overruling deft.., Carpenter's claim of Fifth Amendment priviledge ret.8-25-86 & cert. of service, fld. 7-25-86. (Brief sub.)
7-30-86	27	Court's Order placing the Amended Complt. under seal, fld. 7-28-86. (Lechner) n/m
8-7-86	28	Letter-Order and opinion granting ptfs. motion to unseal amended complaint fld 8-6-86. (Hedges) N/M
8-27-86		At call for hearing on pltf's motion to unseal the amended complaint Court indicated motion to be decided pursuant to Rule 78. (Hedges) (3-5-86)
9-15-86	29	Notice of motion by pltf. to appeal Mag's order of 5-30-86 ret. 10-14-86 & cert. of service fld. 9-11-86. (brief sub.)
9-15-86	30	Notice of motion by pltf. to extend time for appeal of Mag's order of 5-30-86 ret. 10-14-86 & cert. of service fld. 9-11-86. (brief sub.)

9-22-86	31	Letter-request of pltf. for service of summons and amended complt. of deft. International Development Corp., filed 9-19-86.
9-22-86	32	Original summons on amended complt., issued as to International Development Corp., with registry receipts thereon, filed.
9-26-86	33	Motion of deft. John M. Krankel to join in motion of co-defts. for dismissal of amended complt., and proof of service, fld.
10-1-86	34	Notice of motion of deft. W.S. Kirpatrick & Co. International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of the complt., ret. 10-27-86, silb and proof ofservice, filed.
10-6-86	35	Notice of motion of deft. John M. Krankel for dismissal of the amended complt., ret. 10-27-86 and proof of service, fld 10-2- (silb)
10-8-86	36	Reply of pltf. to deft. W.S. Kirkpatrick & Co. International's motion to dismiss complt., filed 10-7-86.
10-20-86	37	Reply of pltf. to deft. John M. Krandel's motion to dismiss amended complt., filed 10-15-86.
10-21-86	38	Notice and acknowledgment of service of copies of summons and complt on deft. John M. Krankel on 10-6-86, fld 10-17-86.
10-22-86	39	Reply of pltf. to motion for dismissal, filed 10-20-86.

10-22-86	40	Letter of deft. Nautilus Environmental Ststems, Inc. re receipt of copies of summons and amended complt., filed 10-20-86.
10-29-86		At call for hearing on motion of deft. W.S. Kirpatrick & Co., International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of complt. Court indicated motion adjourned without date. (Lechner) 10-27-86.
10-29-86		At call for hearing on motion of deft. W.S. Kirkpatrick & Co. International to join in motion of deft. W.S. Kirkpatrick & Co. for dismissal of the complt. Court indicated motion to be adjourned without date. (Lechner) 10-27-86.
10-29-86		At call for hearing on motion of deft. John M. Krankel for dismissal of the amended complt., Court indicated motion adjourned without date. (Lechner) 10-27-86.
11-5-86	41	Letter of pltf. requesting an alias summons be issued as to deft. International Development Corp., S.A., filed 10-3-86.
11-5-86	42	Original alias summons as to deft. International Development Corp. with registry receipts thereon, filed.
11-19-86	43	Notice of motion and motion on behalf of the U.S. Dept. of Justice & Dept. of Justice Atty.Steven Levy to quash the Subpoena duces tecum issued on 9-18-86 ret. 12-8-86 & cert. of service, fld. 11-13-86. (Brief sub.

11-19-86	44	Affidavit of Steven M. Levy, fld. 11-13-86.
12-9-86	45	Affidavit of Alan Turner, filed.
1215-86	46	Certificate of service of brief in opposition to motion to quash subpoena, filed.
1-7-87	47	Affidavit of Rhonda D. Orin, fld 1-5-87.
1-20-87	-	Hearing on pltf's motion to quash subpoena. Ordered motion denied. Order to be submitted. (Lechner) 1-12-87.
1-27-87	48	Order granting motion of U.S.A. to quash subpoena, etc., except as is otherwise set forth herein, filed 1-20-87. (Hedges) n/m
1-27-87	49	Notice of motion of pltf. to appeal order entered on 1-20-87, ret. 1-26-87 and proof of service, filed 1-22-87.
1-27-87	50	Pltf's request for issuance of alias summons on deft. Ross E. Saxon, with affidavit thereto, filed 1-23-87.
1-28-87	-	Alias summons issued on deft. Ross Saxon, c/o Nautilus Enviromedical Systems, Inc. (35 days)
2-3-87	51	Summons returned unexecuted as to deft. Ross E. Saxon on amended complt., filed 2-2-87.

2-17-87	52	Notice and acknowledgment of service of copies of summons and complt. on defts. Emro Engineering Co., and Robert W. Ruppert, on 2-9-87, filed 2-11-87.
2-17-87	53	Motion and Clerk's order for special appointment to serve process of alias summons and amended complt., filed 2-11-87.
2-26-87	54	Transcript of hearing taken on 1-12-87, fld 2-25-87.
2-27-87	55	Notice of appearnce on behalf of deft. R.H. Edwards, filed 2-26-87.
3-18-87	56	Copy of summons returned serve on deft. Ross E. Saxon on 3-5-87, fld 3-12-87.
3-18-87	57	Transcript of hearing taken on 3-6-87, fld.
3-19-87	-	Hearing on defts. DIC and DIC Holding Inc. to dismiss complt. Ordered motion denied. Hearing on motion by attorney for deft. Harry G. Carpenter to join in motion of deft. W.S. Kirkpatrick & Co. Inc. for an order dismissing the complt. Ordered motion granted as to Harry G. Carpenter to join in motion but denied as to order dismissing the complt., Hearing on motion of pltf. to appeal the order of Mag. Hedges of 7-16-86 overruling deft. Carpenter's claim of Fifth Amendment previledge. Decision reserved. Hearing on motion by pltf. to appeal

		Mag's order of 5-30-86. Ordered motion denied. Hearing on motion of deft. John M. Krankel to join in motion of co-defts. for dismissal of amended complt. Ordered motion granted as to John M Krankel joining in motion but denied as to dismissal of amended complt., Hearing on motion on behalf of the US Dept. of Justice & Dept. of Justice Attorney Steven Levy to quash the Subpoena duces tecum issued on 9-18-86. Decision reserved. Hearing on motion of pltf. to appeal order entered on 1-20-87. Ordered motion denied. (Lechner) 3-6-87.
3-20-87	58	Transcript of hearing taken on 3-6-87, fld 3-19-87.
5-5-87	59	OPINION, fld. 5-1-87. (Lechner) (copy to NJLJ)
5-5-87	60	Order granting motion of defts., W.S. Kirkpatrick & Co., Inc., Development Int'l Corp., DIC(Holding) Inc., W.S. Kirkpatrick & Co., Int'l, Harry G. Carpenter, John M. Krankel & R.H. Edwards to dism. and dism. cts. One, Two, Three, Four, Five, Six and Seven of the complt., fld. 5-1-87. (Ldchner) n/m
5-21-87	61	Notice of appeal of pltf., fld 5-15-87 @ 1:00 P.M.

5 1-87	-	Copies of notice of appeal sent to USCA, Rutter, Turne & Stein Esqs Clapp & Eisenberg, Esqs., Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor, Esqs., Silis, Beck, Cummins, Zuckerman Radin, Tischman & Epstein, Esqs., Dominic F. Amorosa, Esqs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL NO. 85-353
	)	
HARRY CARPENTER,	)	
	)	
Defendant.	)	
	)	

INFORMATION

The United States Attorney Charges:

Count One

On or about December 21, 1982, in the District of Newark, defendant Harry Carpenter, an officer and Chairman of the Board of Directors of W.S. Kirkpatrick, Inc., a domestic concern, caused the use of a means and instrumentality of interstate commerce, that is, a Western Union international telex to order Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Bank of Commerce and Credit International in Luxembourg corruptly in furtherance of an Offer, payment, promise to pay and authorization of the payment of money to:

(a) a person, that is Benson "Tunde" Akindele through two companies, Deriks and Los, Panamanian bearer share corporations, while having reason to know that a portion

of such money would be offered, given, or promised, directly or indirectly to foreign officials, Nigerian Air Force officers, the Party of Nigeria, the Minister of Nigeria and other government defense personnel for the purpose of influencing the acts and decisions of such foreign officials and others in their official capacity and inducing them to use their influence within the Government of Nigeria in order to obtain a contract for flight training equipment for W.S. Kirkpatrick, Inc.

All in violation of Title 15, United States Code, Section 78dd-2.

Respectfully submitted,

Thomas W. Greelish
United States Attorney

Steven M. Levy
Fraud Section
U.S. Department of Justice

Laurence R. Maddock
Chief, Fraud Division
United States Attorney's Office

Attorneys for the Plaintiff
United States of America

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
HARRY CARPENTER,	)
	)
Defendant.	)

CRIMINAL NO. 85-353

OFFER OF PROOF

The United States of America and defendant Harry G. Carpenter hereby agree that, if a trial were held in this case, the evidence would show that:

Defendant, Harry G. Carpenter, went to work for the W.S. Kirkpatrick & Co., Inc. (hereinafter "Kirkpatrick") in 1954. Kirkpatrick is a New Jersey Corporation that sells equipment to foreign airlines and airports. He and his wife eventually became majority shareholder in Kirkpatrick, Chairman of the Board of Directors and Chief Executive Officer.

On January 3, 1978, defendant Carpenter and his wife sold their interest in W.S. Kirkpatrick to Development Industrial Corporation, As a condition of the sale, Carpenter agreed to remain as Chairman of the Board of Kirkpatrick and Chief Executive Officer of the Company for five years. He completed his employment contract in January 1983, but remained employed by the company as a consultant while his successor assumed the Chairman's responsibilities, In June 1983, Carpenter left the employment of Kirkpatrick.

While Carpenter was still employed at Kirkpatrick, he learned of an opportunity for Kirkpatrick to sell Aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for a Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele, ("Akindele") a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows:

2 1/2%	-	for Akindele.
5%	-	for Air Force.
2 1/2%	-	for medical group.
5%	-	for the Party.
2 1/2%	-	for the minister himself.
2 1/2%	-	other key defense personnel.

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W.S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

On March 19, 1982, the Government of Nigeria signed a contract awarding the construction of the aero-medical facility to Kirkpatrick. The contract was for 10.8 million dollars. However, the down payment on the contract from Nigeria was not paid until September 1982, and the letter of credit form the Central Bank fo Nigeria was not opened until November 1982.

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows:

	Date	Payee	Amount
1.	9-30-82	Deriks	$117,929.34
		Los	193,657.70
2.	12-21-82	Deriks	290,486.50
		Los	290,486.50
3.	2-02-83	Deriks	145,243.27
		Los	145,243.27
4.	8-08-83	Deriks	290,486.50
		Los	290,486.50

The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Carpenter caused Kirkpatrick to send a Western Union international telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00

to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

Attorney for Harry Carpenter:

HAMILTON P. FOX, III

Attorneys for the United States:

THOMAS GREELISH
UNITED STATES ATTORNEY

Steven M. Levy
Fraud Section
U.S. Department of Justice

Agreed to:

HARRY CARPENTER

Laurence R. Maddock
Chief, Fraud Section
United States Attorney's Office

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY G. CARPENTER,

Defendant.

: Criminal Action

: No. 85-353

: Sentence

Trenton, New Jersey
November 18, 1985

BEFORE: The Honorable JOSEPH H. RODRIGUEZ, U.S.D.J.

APPEARANCES:

STEVEN M. LEVY, ESQUIRE
United States Department of Justice
For the Plaintiff

HAMILTON P. FOX, ESQUIRE
and
THEODORE WELLS, ESQUIRE
For the Defendant

CARL NAMI, JR., CSR, CP
Official Court Reporter
United States District Court
402 East State Street
Trenton, New Jersey 08605

THE COURT: The first matter that we have is the sentencing in the matter of *United States v. Harry G. Carpenter*.

MR. FOX: Good afternoon, your Honor. My name is Hamilton Fox. I'd like to address the Court briefly with respect to the issue of the sentence, and Mr. Wells would also like to address the Court briefly.

Before that, there are two forms in connection with the presentence report which we've executed, and we're handing you, indicating that Mr. Carpenter has read and understands them and understands the report.

(Pause.)

THE COURT: All right.

MR. FOX: Your Honor, there are, as you, I believe, have the form that indicates two minor errors in the report, we believe.

One is the suggestion that this is the first time that anybody has ever been prosecuted under this statute. That is not the case.

The second one is, I believe, is the analogy on page 8. I misspoke. I don't mean analogy on page 8, but the information on page 8 which relates to sentencing. I believe that that information relates to the sentences that have been imposed under Domestic Bribery statutes and not the sentences that have been imposed under the Foreign Corrupt Practices Act.

It is my understanding, and here I need to correct something that I've previously represented to the Court. It is my understanding that there have only been approximately a dozen individuals prosecuted under this statute, and that of that dozen, I previously indicated none, but I've been told by Mr. Levy today that one individual has been sentenced to

incarceration. So, the statistics that are set forth on page 8 of the presentence report clearly relate to some other statute.

There are just one or two brief points which I would like to make in this proceeding. We've set forth our position at length in a memoranda that we've already filed with the Court. But one of the points that I'd like to make, which really relates to the difference between the Domestic Bribery and Extortion statutes which those figures on page 8 relate, and the situation that presents itself to the Court today.

I was a prosecutor for some seven and a half years, and during that time I frequently heard the argument which is somewhat analogous to the argument that I have made today or made in the papers on behalf of Mr. Carpenter, which is that what the Court is faced with is not a situation where there's bribery, but a situation where there is in fact extortion. I was never sympathetic to that argument presented in the domestic content, and yet I do think it is a legitimate argument to make in pursuit of leniency in this case, and as I thought about it, it seemed to me that the difference between the situation that confronts the Court today and the situation that confronts the Court in a Domestic Bribery situation, that there are two differences.

The first is that an individual faced with a corrupt Government official of the United States is seeking a payoff in order to grant him some sort of concession of contract, has an alternative. He doesn't have to pay that money. He can go to the authorities, and if the local authorities are for some reason corrupt, he can go to the Department of Justice in the Federal Bureau of Investigation. An individual like Mr. Carpenter faced with a situation that he faced in Nigeria, doesn't have that luxury. There are no criminal authorities in the country of Nigeria who he can turn to. And, indeed, I think if you'll see in one of the articles which we attached to our sentencing memorandum, there's an indication that the Minister of Justice himself, after the coup that occurred at the end of 1983, was found to be involved in criminal activity.

The second difference I think between the domestic situation and the situation that confronted this individual was that the statute, the bribery statute that applies in a domestic situation, applies to everybody. It applies to all the competitors of the individual who may be tempted to make a payoff. That's not the situation in Nigeria or in other parts of the world where corruption is endemic. The statute applies only to American companies. That doesn't mean that American companies shouldn't follow the statute. But what it does is put them at a severe competitive disadvantage from their competitors in England, France, Germany and Japan and the rest of the world, where it is not a crime under those statutes to do what Mr. Carpenter did.

So, we suggest that those are things that the Court should take into consideration in sentencing this individual.

We also suggest that the Court should take into consideration the fact that Mr. Carpenter has never lied, never covered up, never tried to hide what his role has been in this situation. He came forward to the Government before he was ever even subpoenaed, before he was ever contacted for interview by the Government. He has fully cooperated with the Government. I believe the Court has received a letter from Mr. Levy which so indicates. This was not an easy thing for this man to do. He's a competitive individual. He's been a businessman all of his life. He believes in competition, he believes in fighting, and yet he was never, ever in a situation where he wanted to distort or lie or misrepresent what he has done. He has faced up to that. He has been candid about it, and he's come forward and cooperated fully.

Finally, there are the personal qualities of this individual, many of which we've set out at some length in our sentencing memorandum.

I have participated in a number of sentences, many on the other side of the courtroom. In many of those sentences there have been letters which have been filed on behalf of the individual. Those letters are always filed. I once attended a

sentencing conference where the wisdom of filing some such letter was discussed, and it was concluded that you'd better file them because the absence is going to be noted. Most of those letters that I have seen in other cases are letters which one judge refers to as "I love Lucy letters," the defendant is a terrific guy; please be nice to him.

The letters which have been submitted on behalf of Mr. Carpenter I think are qualitatively different than any I've ever encountered, because they set forth with specifics the examples of the kind of man that Harry Carpenter is and the kind of service that he's rendered to the state and to his country. And I would predict that during your Honor's tenure on the Bench, which I realize that has not heretofore been long, that you are unlikely to see letters of that quality in any other case. Indeed, I was struck particularly by the examples of community service that he has previously rendered to his community, examples which I certainly could not match up in my own career, and I doubt that many of us could live up to.

But finally, if I could make just two personal observations, having spent a lot of time with this man over the last year, those, the first good thing that I would like is something that is noted in a number of the letters that were submitted to your Honor, particularly the letter of Mrs. Carpenter, and that is the patriotism of this man. And I think what is so ironic or unfortunate or tragic or whatever the adjective is about that, is that Harry Carpenter finds himself in a situation where he has always believed it is the patriotic thing to do, not just to serve your country, but to participate in the international market aggressively to try to build a company that supplies jobs and helps the American economy. And yet—and he did that, and he overstepped the bounds of doing that, and we all concede that as we're standing here today, but he is a patriot, and it is ironic for him to stand and hear your Honor call the case of *United States v. Harry Carpenter*. That's a very, very difficult thing for this man to live with.

The second and final point that I want to make is that I have been struck during this year, this 14 months, which were

something that I think comes clearly through in the letters that have been written about this man, about his personal kindness and consideration for others. He has obviously been someone who has been under tremendous stress. But I think that I can speak for myself and Mr. Wells and everyone else who has had to deal with Harry Carpenter. He has always been considerate of others. He has always put the interest generally much more—must less serious than those of his own, ahead of his own. He's always been very kind and considerate to everyone. He's a man that I'm proud to call a friend, and I hope that that comes through to the Court in the letters and the materials that we've submitted on behalf of this man, and that the Court will exercise leniency in taking into consideration the characteristics of this man, the situation he found himself in which led to the violation of the statute, and finally, his cooperation with the Government.

Mr. Wells has a few points that he would like to add.

THE COURT: Thank you.

Mr. Wells?

MR. WELLS: Thank you.

Your Honor, in the sentencing memorandums submitted by Mr. Fox and myself, we urge the Court to impose a fine upon Mr. Carpenter in sentencing him for this violation.

I would like to address myself to why we feel a fine is the most appropriate sentence. The options that your Honor faces are as follows:

Your Honor could impose a sentence of incarceration. Your Honor could impose a sentence of probation. Your Honor could impose a fine or some combination of the three.

We suggest in the first instance that the imposition of a sentence of incarceration would be inappropriate in this case. We think, given Mr. Carpenter's character, his cooperation

with the Government, he stands before your Honor as a cooperative Government witness. And given the background of this case, that incarceration would be inappropriate.

We emphasize to your Honor the fact that in the history of this Act, only one individual has ever been incarcerated, and in that case, to our understanding, the Government took the position that incarceration should be imposed, but this is a far different case, your Honor. It is a case where the Government takes no position and where Mr. Carpenter is, as I have indicated, a cooperating Government witness. We suggest that the real question before your Honor is whether it is appropriate to impose the sentence of probation or alternatively, impose a fine.

In the only case, to my knowledge, in the District of New Jersey that is similar to Mr. Carpenter's, Judge Thompson imposed a sentence of a fine upon certain executives of the General Electric Corporation that were charged with an overseas bribery payment. And that case, which is reported as *United States v. Steel*, I had the opportunity to represent one of the GE executives. That case was initially tried before Judge Thompson. Convictions were obtained. The case was reversed in the United States Court of Appeals for the Third Circuit, and on remand, all defendants agreed to enter a plea of guilty. The corporation entered a plea of guilty and three individuals. Judge Thompson imposed the maximum fine on both the corporation and on each of the individuals. She did not impose any condition of probation.

I would suggest using that as a bench mark, that such a sentence, that is a sentence of solely a fine, is highly appropriate in this case. To impose a condition of probation, a sentence of probation upon Mr. Carpenter I suggest would be inappropriate, because the real reason, the real purpose for imposing probation is usually to make sure that when the person is returned to society or as the person continues in his or her job, that the Federal Government will have an opportunity to periodically survey the activities of that person,

and make sure that the person is not overstepping the lines again.

In Mr. Carpenter's case, however he has been charged with violating a Federal statute that purports to regulate conduct in the international business community. Mr. Carpenter is now retired. He's no longer part of the international business community. He spends his time now, and plans to spend his time in the future, helping his wife in their store and fixing up their house, and also in certain community activities. But he is out of the international business game. He's no longer part of that community. And no one has ever suggested that outside the international business community, Mr. Carpenter has ever had any type of troubles with the law. In fact, everything is to the contrary. He's been an exemplary citizen, and I urge that given the fact that he has taken himself out of that business community, that international business community, that to impose probation in this case would really not advance any goals. It would cause the Government, in fact, to expend, I would suggest, needless time. There's nothing to supervise in this case. He has taken himself out of the critical area.

I would argue, also, that to impose community service, although Mr. Carpenter would do anything your Honor asks in this area, would also be inappropriate. For the last month, Mr. Carpenter has basically lived in my office on a daily basis. He have attempted to put together appropriate letters for your Honor's consideration, and also we have spent a lot of time resigning from organizations. We've been on the phone apologizing to certain organizations that Mr. Carpenter has worked with for many years, saying that it was Mr. Carpenter's opinion that because of this circumstance, it would be inappropriate for him to continue to serve. Because if he were given probation, somebody might look up one day and point a finger and say, ha, you've got somebody on your board of directors who is on probation. And given this circumstance, to put him on probation, I suggest, would be contrary and against the public interest, because it puts him in a situation where he can't go back to work for the various community organizations that he has worked with for so long.

I would argue that given these facts, the most appropriate sentence would be the imposition of a fine, even if it be the maximum fine. But to put him in a position where he can get this matter behind him, where he can get this matter behind him and return to the community to continue the type of public service that he has given freely so much of in the years past, and I suggest that probation won't help anyone. In fact, it will hinder his ability to continue to serve the community that he has served so well throughout the years.

Thank you.

THE COURT: Thank you, Mr. Wells.
Mr. Carpenter, is there anything you wish to say?

THE DEFENDANT: Your Honor, I have nothing much that I can add to the words of my attorneys and the letters written. These past 14 months have obviously been very painful, and I wanted to express to you how very sorry I feel about this entire situation.

THE COURT: All right, I can appreciate your feeling, Mr. Carpenter, and I have had over the past several days the occasion to read the many letters and correspondence that were directed to me prior to sentencing in this matter. And they are, very frankly, extremely favorable with respect to the activities of Mr. Carpenter in the past. And today sentencing comes, again, at a very strange time, when we speak about the citizenship, just having finished a ceremony of naturalization where we tell everyone, the citizens, their rights and responsibilities as citizens of the United States, which they took freely. I think what gives me the greatest amount of concern in this case is that the magnitude of what is occurring as a result of bribes in Nigeria is incomprehensible when one sees what is referred to as the Garden of Graft, and I think the 60 Minute segment that was left at my home this weekend so that I could view, and which I did last evening, and I understand it was by consent of all the parties, that it makes a -- doesn't make a plea, it makes an exposition, I think, of something that almost unspeakable when elected officials are

able to exact, almost by way of extortion, large amounts of money while they ride through their subjects that are practically starving to death. And, of course, if it were someone who had acquired some of that wealth, who gains accruing to them as a result of that activity, it's one that the full force of the law, I think, would have to demand that justice be done.

What also impresses me here is that the United States has seen fit to pass an act that deals with corruption of foreign officials, and I think we all understand what that means and what the mandates of Congress are with respect to that law, that perhaps acknowledges what's going on overseas and demands that at least with respect to the businesses here, that it not engage in that activity. It is different than domestic bribery. Domestic bribery does have the full force of the law that can reach that corrupt official, as we have seen the poast, that it does in fact work, and it is a way out for someone who feels that they're being extorted in order to receive a contract from the Government. It's not easy, but I think in fairness, we have to recognize that that in fact is occurring, and it occurs many times at a disadvantage of the businessmen of the United States, although it's certainly no defense and no excuse, because in some way it does continue that process.

But what I'm forced to do is to look at this case and determine whether Mr. Carpenter, as he stands here, should receive the full force of that law that's been passed and mandated by Congress. I think there is a certain amount of discretion that the Court has. I am impressed by the letter that I received from Mrs. Carpenter, and it's not easy for me to read a lot of the words that indicate a man who has been serving his country and has been serving his community, and even to the extent that I see from the alleged article, that he was in The Jerseyan of the week or the month, or whatever that time frame was. So, I do someone standing before me that's had no prior record and who has, according to the Department of Justice, been cooperating completely with Federal law-enforcement authorities as a result of what has occurred, and according to them, that that cooperation has been beneficial, in the hope of stamping out this kind of activity in the future.

Mr. Carpenter apparently, from the presentence report, has not had a prior involvement with the law with respect to activities which would require the law to be involved, as far as crimes are concerned. So, it's a man with a record, that except for this occurrence, would be exemplary in every way. However, the Court does have to acknowledge that what occurred is not proper, and that what occurred does require a certain amount of reaction in the sense that society has to know that at least from this point forward or into the future, that this type of activity cannot be condoned. But taking everything into consideration, as I say, it's not an easy matter when you review the entire record that's before me, to suggest that simply a fine would be sufficient.

I think that to the extent that there is something as a result of what occurs, that some degree of service to the community of course, should also be required.

Taking everything into consideration, my sentence is as follows:

It is adjudged that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of three years upon the following terms and conditions. That he pay a fine in the sum of $10,000 in such amounts per month as determined by the Probation Department, and that he perform 200 hours of community service under the direction of the Probation Department. Special assessment provisions are not applicable in this case.

Now, I think in doing that, I struggled a great deal with the effect of the words sentence is hereby suspended and what probation means. But I think I'm attempting to exercise that discretion in reviewing the entire file. And knowing that there's a man before me who, that jail would seem inappropriate for the purpose that it would serve, and especially when one views that what we're dealing with here is not a domestic situation, but a foreign situation that's well-known throughout the world as a Garden of Graft. Perhaps there's some mechanism of reaching that graft and making sure

that the people that are subjected to it and its oppressive activity, someday receive some form of justice.

With respect to this Court, I think justice is served with probation for a period of three years, the imposition of a fine and community service.

MR. WELLS: Than you, your Honor.

MR. FOX: Thank you, your Honor.

THE COURT: Thank you.

MR. LEVY: Thank you, your Honor.

(This matter was then concluded.)

* * *

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
W.S. KIRKPATRICK, INC.	)
	)
Defendant.	)

CRIMINAL NO. 85-415 JHR

Title 15, United States Code,
Section 78dd-F[ ]

INFORMATION

The United States Attorney Charges:

Count One

On or about December 21, 1982, in the District of Newark, defendant, W.S. Kirkpatrick, Inc., a domestic concern, used a means and instrumentality of interstate commerce, that is, a Western Union international telex from Fairfield, New Jersey, to New York, New York, to order Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Bank of Commerce and Credit International in Luxembourg corruptly in furtherance of an Offer, payment, promise to pay and authorization of the payment of money to:

> (a) a person, that is Benson "Tunde" Akindele through two companies, Deriks and Los, Panamanian bearer share corporations, while having reason to belive that a portion of such money would

be offered, given, or promised, directly or indirectly to foreign officials, Nigerian Air Force officers, the Party of Nigeria, the Minister of Nigeria and other government defense personnel for the purpose of influencing the acts and decisions of such foreign officials and others in their official capacity and inducing them to use their influence within the Government of Nigeria in order to obtain a contract for flight training equipment for W.S. Kirkpatrick, Inc.

All in violation of Title 15, United States Code, Section 78dd-2.

Respectfully submitted,

Thomas W. Greelish
United States Attorney

Steven M. Levy
Fraud Section
U.S. Department of Justice

Laurence R. Maddock
Chief, Fraud Division
United States Attorney's Office

Attorneys for the Plaintiff
United States of America

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
W.S. KIRKPATRICK, INC.	)
	)
Defendant.	)

CRIMINAL NO. 85-415

OFFER OF PROOF

The United States of America and defendant W.S. Kirkpatrick, hereby agree that, if a trial were held in this case, the evidence would show that:

Defendant W.S. Kirkpatrick (hereinafter "Kirkpatrick") is a New Jersey Corporation whose principal business is the sale of aircraft related equipment.

In 1981, Harry G. Carpenter, who was at that time Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los" , two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows:

2 1/2%	-	for Akindele.
5%	-	for Air Force.
2 1/2%	-	for medical group.
5%	-	for the Party.
2 1/2%	-	for the minister himself.
2 1/2%	-	other key defense personnel.

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W.S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

On May 19, 1982, the Government of Nigeria signed a contract awarding the construction of the aero-medical facility to Kirkpatrick. The contract was for 10.8 million dollars. However, the down payment on the contract from Nigeria was not paid until September 1982, and the letter of credit from the Central Bank of Nigeria was not opened until November 1982.

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows:

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The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union international telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

Attorney for W.S. Kirkpatrick, Inc.:

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 85-415

UNITED STATES OF AMERICA, :

v. :

Sentencing

W.S. KIRKPATRICK & CO., INC., :

:

Defendant.

January 6, 1986
Trenton, New Jersey

BEFORE:

THE HONORABLE JOSEPH RODRIGUEZ, U.S.D.J.

APPEARANCES:

THOMAS W. GREELISH, U.S. ATTORNEY
FOR THE DISTRICT OF NEW JERSEY,
BY: STEVEN LEVY, A.U.S.A.,
For the Government.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ. (N.Y. Bar)
For the Defendant.

THE COURT: All right. We are here this afternoon for the court schedule of the sentencing of W.S. Kirkpatrick & Company. Are you ready?

MR. LEVY: Yes, your Honor, the United States is ready.

MR. SEAR: Yes.

THE COURT: May we have your appearances for the record?

MR. LEVY: For the United States, your Honor, my name is Steve Levy, L-e-v-y.

MR. SEAR: Your Honor, my name is Thomas H. Sear, and my associate here is Miss Rhonda Horn and Mr. Larry Horn, also has been involved in this matter, and as your Honor will recall, introduced me to the Court last time, I believe.

THE COURT: Yes.

THE COURT: Mr. Sear, do you want to proceed?

MR SEAR: Yes, your Honor.

I will attempt to be brief. I have made that promise in the past and not carried it through on, but I think I can do a better job of that this afternoon because we have attempted to put, to the best of our ability, all the information that we thought was relevant and necessary before the Court in our presentence memo.

And the two reasons for my standing up right now are, number one, if your Honor has any questions about any of the matters that we put forward or any other aspect of the case, I will be happy to respond to an inquiry by your Honor. And secondly, I just wanted to emphasize certain of the critical points that we think counsel for a lenient, fair, reasonable, merciful sentence in this matter.

And I suppose it seems a little bit strange talking about being merciful when you are dealing with a corporation which is a nonhuman entity, but I would suggest to your Honor that the real sentence that is going to take place here this afternoon is of the individuals, the people who are with W.S. Kirkpatrick & Company, Inc.

As we have indicated, since 1984, the status and the critical difficulties of the corporation have resulted in some 28 jobs being eliminated, but at present there are 28 individuals from the present chief executive on down who are attempting to turn this situation around, put this very tragic and troubling matter behind them, and in viewing them, I think it is absolutely critical that everyone understand that these individuals did not participate in what went on here. They didn't benefit from it. Indeed, the shareholders of this corporation have not taken any dividends or distributions in connections with this.

Besides the fact that the individuals who are at the corporation now were not involved in this matter, it was taken, the crime was really committed by an individual who not only is not there any more, but who was acting in complete contravention of the well-established clear policy of the corporation.

In addition, I know your Honor, in sentencing Mr. Carpenter, took into account all the facts and circumstances, including the nature of the offense here. Well, I don't, while I don't mean to excuse the conduct, I think we have all reviewed the facts in such manner and detail as to fairly indicate that we are not dealing with conduct that is as culpable as is involved in a number of other crimes.

I also want to make a very basic point that I think the Court ought to take into consideration, the extraordinary cooperation of the corporation here. I have been involved in law enforcement both as a prosecutor and as a private counsel for, I don't know, ten or eleven years, and I can't remember, at least and I don't think I was ever involved in a situation which an entity or a person took such a principled, responsible position.

In this case, when the company discovered the documents and it indicated a crime has been committed, not only did they produce them to the Government, but they isolated them out and specifically directed the Government's attention to those documents. I think it is fair to say that that act by the company resulted in Mr. Carpenter's determination to cooperate with the Government. Up until that point he had, as I understand it, completely professed his innocence. He certainly had done so to the company.

And I think that not only is important in terms of saying, well, the company cooperated, but it is concrete evidence of the fact that we have responsible, law-abiding people who are in control and who are running this company now, and who in a very difficult situation are trying to save the jobs of a bunch of people and go forward and conduct their business.

In that regard, I would finally say that any fine for this corporation would be a substantial one, under the financial situation and status of this company. A large fine will almost certainly put the company out of business, because given the numbers, given the performance, given the obligations of this company already, it makes absolutely no sense for it to continue if on top of the staggering losses and the incredible deficit, negative net worth that it now has, if a large fine is imposed on top of it, a large fine I might add, I can't see how the corporation could pay.

But those are the points that I wish to emphasize. I thank you for your time, your Honor, and again I reiterate if now we are, after Mr. Levy speaks, you have any questions, I would be happy to respond to you.

THE COURT: Thank you, Mr. Sears. Mr. Levy.

MR. LEVY: Thank you, your Honor.

Your Honor, let me preface my remarks by saying that I think that the Government, as well as the corporation, is very interested in seeing that the Court metes out a sentence which is

fair. I hadn't intended to really address the Court today, but I did receive a sentencing memo from Mr. Sear the other day which raises certain points that I believe need to be addressed. One of those points in the memo is that Harry carpenter acted alone.

Your Honor, the Government's investigation has revealed facts that are directly to the contrary of that position. The Government has evidence that Mr. Carpenter did not act alone, that Mr. Carpenter did act with the, he did act with the senior officers of the corporation; he did act the president; he did act with the vice president in charge of finance in bribing these Nigerian officials or in violating the Foreign Practices Act, which is the count which is charged in the information before the Court.

I can name the individuals for the Court if you would like, but the individuals, the president of the company, the vice president in charge of finance are both named in some -- in the documents to which Mr. Sear referred, the interoffice company memoranda that were written by Harry Carpenter, discussed with them, given to them.

So I think it is pretty clear to the Government, your Honor, that Mr. Carpenter was not acting alone. He was acting in conjunction with the senior officers of the corporation. Mr. Carpenter was chairman of the board of directors, acting for the board of directors, so we feel that that contention that has been raised by the defendant that Mr. Carpenter was acting alone is not grounded in fact.

I might also say that there is some evidence from Mr. Carpenter that an official of the corporation which owns W.S. Kirkpatrick was involved intimately with the payment of this -- this improper payment to this Nigerian national which is charged in the information. I can also name this individual for the Court. And I might say to the Court that this individual is not a United States national, he is a Syrian national, I believe. We have invited him to appear before the Grand Jury. We have attempted to elicit the cooperation of Mr. Sear in getting

him here, and I think that Mr. Sear has done all he can, but however, this individual has indicated that he is not going to appear without I think a grant of immunity which the Government is not going to give.

The next point that I would like to address, your Honor, is that there were no other instances by W.S. Kirkpatrick, violations of the Foreign Corrupt Practices Act. The Government is also in possession of the fact there was another violation of that Act, the Foreign Corrupt Corporations Act by the corporation, and this is outside the statute of limitations, so therefore the Government has not elected to proceed on it.

Another point I would like to address is that no competitors of W.S. Kirkpatrick were excluded from bidding on the Nigerian contract. Your Honor, the Government is in possession of evidence which indicates that this is false, because William Mitchell , who is the president of Environmental Techtonics Corporation, a Pennsylvania corporation, was quire interested in bidding on this Nigerian contract. Mr. Carpenter, as well as others at W. S. Kirkpatrick were aware of this, and it appears from the evidence that we have that in fact Mr. Mitchell was excluded from bidding on this contract because of the improper conduct by Mr. Carpenter, the corporation and other senior officers at the corporation.

There was also made mention in Mr. Sears sentencing memorandum of no evidence of payment being actually made to these foreign officials. I should tell the Court, your Honor, that the Government has been for the last three-quarters of a year attempting to obtain the permission of the Government of Luxembourg , in order to penetrate their bank secrecy laws, in order to get the necessary documents from the banks in Luxembourg .

The State Department has been helping with this, and as I understand it, that information may soon be forthcoming in this year. So it is not a question of the evidence not existing, it is just a matter of following the protocols with the Government of

Luxembourg and with the State Department in order for them to give us something which they ordinarily would not do.

The next thing I would like to say about this case, your Honor, is that there has been made mention of the fact that no present employees of the company are accountable for the situation at hand. I would agree with that except for the fact that one of the individuals who is now in a very prominent position is still at the corporation. This individual is current, has been sent the target letter by the Department of Justice advising him that he is a target of a Grand Jury investigation, that the Government is contemplating indictment. And so I would say to the Court that except for this one individual, Mr. Sear's statement is true, there are no employees here who were responsible for, but this individual who directly authorized the payments to this Nigerian note in violation of the Foreign Corrupt Practices Act, your Honor, is still there.

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

This is not a case where there is not a victim. Shagari, who is the president of Nigeria at the time of this contract is now under house arrest. Some of these other individuals and I can name them if the Court is interested, are a very prominent military figures who are still in power in Nigeria . The Nigerian government would certainly like to have their names, and I think the reason for the enactment of the Foreign corrupt Practices Act is in part because of the devastating political impact that payments on corruption has, and I think that is present in this case as well, on the Government.

The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

THE COURT: Thank you. Mr. Sear , is there a response?

MR. SEAR: Yes. Certain of the points made by Mr. Levy , I can't really respond to because he is indicating he has received the information that we have never been made privy to and we don't know anything about, and if he has got it, he has got it, and if he doesn't, he doesn't. I don't think those sort of general observations provide the proper basis for determining what fine ought to be given to Kirkpatrick.

Secondly, with respect to the situation in Nigeria, I don't think that again, present political situation, what has happened there, is also a highly relevant fact that ought to be given a lot of weight.

The one thing that concerns me the most is, though, and I do want to respond to, and that is the notion that other individuals at the company, one of whom is still there, acted

along with Mr. Carpenter. I mean, the memorandum that I gave to Mr. Levy back in November, that I have referred to, they show that Mr. Crankle was a recipient . But I know Mr. Carpenter has, both through his lawyers and directly to me, told me that he acted alone. And it is my understanding that is what he has told the Government and I know the Government indicated that Mr. Carpenter had cooperated fully and had been truthful with him.

Indeed, Mr. Levy and his then supervisor and I had a conversation almost a year -- well, over a year ago, I guess, in which we discussed the situation with respect to Mr. Crankle, because it was brought up, the fact that he is still with the company and he is indicated as a recipient of this memo. My position then was, look , we are going to act responsibly. We are not going to go out and fire somebody to help us in connection with an investigation. But if we learn of evidence that somebody was involved in a crime, participated in a crime, we will take appropriate action, but to this date, all that we have heard and been told is that he is shown as a recipient on the memo.

It is my understanding Mr. Carpenter has simply said, Mr. Crankle got this memo, that is about it, that is all I can tell you. Again, this is somebody who the Government said to your Honor had been truthful and candid. Now, the point I am -- all I am really making here is that the fairly construed, no matter how you say whose name is on the memo or whatever, this was an individual act by one person. I mean, I have enormous sympathy for Mr. Carpenter. The situation that he found himself in, and I think he truly was trying to do good for the company as well as himself but this is not a situation where you have a bunch of people at the company and you have corporate policy, you have a truly corporate act that demands some stern response. It is a situation in which one man committed a crime and because of the theory of vicarious responsibility, the company is responsive.

So I think the Court ought to take that sort of reality in account, and unless you have any questions, I have no further comments at this time.

THE COURT: No, I have no further questions. Mr. Levy.

MR. LEVY: Yes, your Honor

THE COURT: I want to be sure I do hear out both counsel.

MR. LEVY: All right. Mr. Carpenter has made a series of approximately four, perhaps five proffers to the Government in which he completely details his involvement from beginning to end with this Nigerian contract and the improper payments to Ackendelli, and during the course of this, he describes the circumstances that led him to writing these memos.

Well, the reason that he wrote the memos is because he wanted these two individuals that are named on these documents to be completely aware of everything that was happening in the event that he was to leave the corporation, which he was going to do in January of 1983. He fully discussed it with these two individuals. They lived this on a day-to-day basis. That is the reason he wrote it. He was not acting alone. He was acting, I must admit he was acting for the benefit of himself, but he was also acting for the benefit of the corporation because he knew that the corporation needed that contract, that 10.8 million dollars contract.

When I read Mr. Sear's memo that the corporation did not profit, I was absolutely flabbergasted. To give the company a million dollars, for them to conduct their business operations for them to meet -- to have the funds necessary to meet their day-to-day survival is an absolute benefit, in the eyes of the Government. And that is why we told the probation officer that any that any fine in terms of the Government's case must be considered substantial when measured against that

approximately 1 million dollars profit. Thank you, your Honor.

THE COURT: I guess one of the more difficult things in this case is the fact that we are dealing with a corporation, and sometimes it is like punching a bag of smoke. You kind of wonder where the real damage is done by the actions against the corporation. Many times, frankly, innocent people can suffer. And I respect that argument that is made by Mr. Sear. I do note that I have a document before me that does indicate that, with respect to the presentence report, that W. S. Kirkpatrick & Company has fully reviewed it and they have made their comments with respect to that report in their presentencing memorandum.

That was executed today, January 6, 1986.

There are a couple of things that I think are worthy of some comment, and as I say, it is not an easy matter to try to establish what should be the real deterrent in this case. But I am somewhat influenced by the fact that the corporation, and it doesn't seem to be much dispute, did take the initiative to whatever degree, in cooperating with the Justice Department once it was known that they were, or that Mr. Carpenter was somewhat involved in violation of this act, and this Foreign Corrupt Practices Act, as indicated in the presentencing memo. Apparently counsel for the corporation went to Washington and actually hand-delivered certain key documents which perhaps would have been found in any event, but made the search a lot easier. There is indication that the corporation has a policy and the policy is one where naturally it would indicate that it doesn't condone any violation of the foreign corrupt Practice Act.

The corporation further indicates that their profit margin before they entered into this situation was set before the total involvement with the corruption in Nigeria . I guess the indication there being that the profit was certain, certainly not expanded but what had to be build into it was this payment in order to facilitate the granting of the contract. All in all it

doesn't indicate the purest of intention on the part of the corporation. The corporation is in fact involved.

But then it comes to the matter of imposing a fine. The presentencing memorandum itself filled with indications and the letters that I have received from the actual employees of the corporation indicating that there is really no ability of the corporation to pay, that they haven't paid dividends since 1978, I believe it was, that the real victims here would be the lower level employees who would suffer because the corporation would actually respond by making funds available, taking them away form those who perhaps are most innocent, and I think that is the perplexing part of this kind of a sentencing, when you seem to want to move against a small corporation, small in that the victim is more identifiable as being the lower level employee, as against Mr. Carpenter who in order to achieve his bonus could very well have been stimulated into acting personally but we can't say that that action only went to Mr. Carpenter.

Actually, the corporation simply by benefit of obtaining the contract benefited through the profit to some degree. And I can't completely ignore the fact, although it is absolutely no excuse, that corruption is a way of life from the records before me in Nigeria, and I think that is one of the most disturbing facts that I confront, because when you do look at corruption being a way of life, you have to realize that the victims, the ultimate victims of that corruption are the poor souls in Nigeria who certainly are suffering enough, but who become greater victims at the hands of those who corrupt in the name of their government, and yet they are out of reach of this Court, and I think that is where the real danger lies.

Mr. Levy makes a point that the corporation knew and that seems to be refuted. I think for the purposes of this sentencing, that I don't have to go beyond what was capable of proof in any event, because I think if there are those who knew, who are still there, they should be the real persons to respond for the damage that they have created because they can be subject to punishment as individuals, that there were no

other violations that they occurred outside the statute of limitations.

I have no proof before me to know how to measure that and I didn't consider that in the sentencing, that a competitor suffered. Again, there is no real proof against the corporation after their plea to know how to measure some of the allegations, although they are there, and again, I give no real weight to that factor in the sentencing. That their are efforts to reach the foreign bank accounts, I can appreciate that that is occurring and should occur, but again, I have no way of measuring that fact from our records at this sentencing, and that there are present employees who are targets, perhaps, or being pursued by the Government, people still in existence in the corporation, I think that is perhaps where the investigation should go, and for my purposes this afternoon, that information should not play any part in the sentencing here because I am bound in fairness by the record that is before me.

I have no hesitation in saying those who authorized or participated in should be the real targets of the Government's investigation. We are now left, however, with the corporation. How do you deal in fairness with a corporation that is small and says that the real victims are going to be those who did not participate in it, the lower level employees? The corporation that says it really can't afford to pay, that any substantial fine would drive them out of existence, almost like a death sentence to a corporation.

And being a human being, and you try to measure these things, it is not an easy matter to measure because you do have a certain amount of feeling, and one feeling is that I totally respect the passage of the Foreign Corrupt Practices Act because I think that if the Government is ever going to give a signal as to what fair dealing is, it has to do it, this is one way of doing it and that act must be respected.

So that we indicate that it is a way of life in other nations, it can't be a way of functioning by citizens of this nation, and I think that is the way we started, indicating what the ideals to

which we are dedicated really mean, and that is by living them here, so that even though it is a new act and we don't have a lot of experience as to how to sentence corporations under it, it is an act which nevertheless must be fully recognized and allayed.

The next question is how do you balance that? Whatever signal should be given to the corporations of the United States in saying that that act will be followed, and I think in doing it with some balance and some fairness those who are actually before the Court now, I think the $10,000 requested by counsel is certainly not sufficient to indicate that this kind of activity will not be condoned. I think the measurement has to be one where the amount has to be substantial as applied to this corporation, where the amount of the fine should certainly not be taken as precedent against any other individual corporation because I hope it is a measurement of what should be the fine to this corporation, taking all of the circumstances before me, by giving full consideration to all the circumstances presently before me.

The fine that this Court feels should be imposed, under the circumstances of this case, is a fine of $75,000 to be payable within an arrangement with the probation office over the period of five years. That is certainly not the $10,000 requested by counsel. It is certainly not a figure that I think is totally punitive to the extent of playing partially against the innocent victims of that corporation, but I hope it is one that because this is a new area of the law and we don't have a lot of precedent to measure. that does sound the signal to say perhaps this is a learning process. Violation of this act will not be condoned and if lessons are not learned, perhaps the fines will have to be stiffer in the future.

Under the circumstances, gentlemen, I think a sentence in this case would be $75,000 payable by W. S. Kirkpatrick & Company over a period of five years. That arrangement to be worked out by the Probation Department. Is there anything further?

MR. LEVY: The Government has nothing further, your Honor.

MR. SEAR: No, your Honor, other than to say it has been a pleasure and a privilege to be before you.

THE COURT: Thank you.

MR. HORN: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL County Line Industrial Park Southampton, PA 18966	:	CIVIL ACTION NO. 86-796-HJS
v.	:	
W.S. KIRKPATRICK & CO., INC. 22 Audrey Place Fairfield, New Jersey	:	
and	:	
DIC (HOLDING) Inc. 767 Fifth Avenue New York, New York 10153	:	
and	:	
INTERNATIONAL DEVELOPMENT CORPORATION, S.A. C/O INTERNATIONAL SHIPPING & TRADING SERVICES, S.A. P.O. Box 604 Luxembourg	:	
and	:	
Harry G. Carpenter P.O. Box 192 (Holland Road) Bedminister, NJ 07921	:	
and	:	

BENSON "TUNDE" AKINDELE
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and

JOHN M. KRANKEL
36 Elden Place
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and

W.S. KIRKPATRICK & CO., INTERNATIONAL
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and

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and

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and

ROSS E. SAXON
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13800 Westfair East Drive
Houston, TX 77041

and :
:
R.H. EDWARDS :
15 Woodland Court :
Kinndlon, New Jersey 07405 :

AMENDED COMPLAINT

I. THE PARTIES

1. Environmental Tectonics Corporation, International ("ETC"), Plaintiff herein, is a Delaware corporation having its principal place of business at County Line Industrial Park, Southampton, Pennsylvania 18966.

2. Defendant W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), is a New Jersey corporation having its principal place of business at 22 Audrey Place, Fairfield, New Jersey.

3. Defendant DIC (Holding) Inc. ("DIC") is a Delaware corporation having its principal place of business at 767 Fifth Avenue, New York, New York 10153 and regularly doing business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

4. Defendant International Development Corporation, S.A. ("IDC"), is a corporation duly organized pursuant to the laws of the country of Luxembourg having a principal place of business at the premises of International Shipping and Trading Services, S.A., P.O. Box 604, Luxembourg, and regularly doing business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

5. Defendant Harry G. Carpenter ("Carpenter") is an individual citizen of the State of New Jersey having his residence in Bedminister, New Jersey, and at all times relevant hereto regularly conducted business at 22 Audrey Place,

Fairfield, New Jersey, as the Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick.

6. Defendant Benson "Tunde" Akindele ("Akindele") is a citizen of Nigeria residing at Flat 25, The Watergardens, Burwood Place, London, W2, England, and at all times relevant hereto regularly conducted business within the State and District of New Jersey at 22 Audrey Place, Fairfield, New Jersey.

7. Defendant John M. Krankel ("Krankel") is an individual citizen of the State of New Jersey residing at 36 Elden Place, Fairlawn, New Jersey. At all times relevant hereto, Krankel was Secretary and Treasurer of Kirkpatrick.

8. Defendant W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), is a corporation duly organized and existing under the laws of the State of New Jersey with its principal place of business at 22 Audrey Place, Fairfield, New Jersey.

9. Defendant Emro Engineering Co., Inc. ("Emro"), is a New Jersey corporation doing business regularly in the State of New Jersey and is engaged in the business of providing engineering and design services in, *inter alia*, the aeromedical field and is involved with manufacture and/or sale of, *inter alia*, aeromedical equipment.

10. Defendant Robert W. Ruppert ("Ruppert") was, at all relevant times, the President and Chief Executive Officer of Defendant Emro, and, upon information and belief, a citizen of New Jersey.

11. Defendant Ross E. Saxon ("Saxon"), who is believed to be a Texas citizen, was, at all relevant times, the Chairman of the Board of Directors and Chief Executive Officer of Nautilus Environmentals, Inc., formerly a Texas corporation which was in March 1983 reincorporated in the State of Delaware and which thereupon changed its name to Nautilus EnviroMedical Systems, Inc. (collectively "NEI"). NEI

maintains its principal place of business at 13800 Westfair East Drive, Houston, Texas 77041. At all times relevant hereto, NEI and Saxon conducted business in the State and District of New Jersey with Kirkpatrick and Kirkpatrick International.

12. Defendant Robert H. Edwards ("Edwards") is a citizen of the State of New Jersey and was, at times relevant hereto, the President of Defendant Kirkpatrick.

II. JURISDICTION AND VENUE

13. The jurisdiction of this Court is founded upon 28 U.S.C. §1331 (Counts 1, 3 and 4); 18 U.S.C. §§1964(c) and 1965(a) (Count 1); 28 U.S.C. §1332 (Counts 2, 5, 6 and 7); 15 U.S.C. §15 and 28 U.S.C. §1337 (Counts 3 and 4); and the pendant jurisdiction of this Court is invoked as to Counts 2, 5, 6 and 7.

14. Venue is properly laid in this District pursuant to 18 U.S.C. §1965 and 28 U.S.C. §1391.

III. THE CONDUCT OF DEFENDANTS COMPLAINED OF BY PLAINTIFF; THE PATTERN OF DEFENDANTS' RACKETEERING ACTIVITIES.

15. Defendant Kirkpatrick, at all times pertinent hereto, was a New Jersey corporation that sold and brokered aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

16. Commencing in 1954, Defendant Carpenter became an employee of Defendant Kirkpatrick and thereafter eventually became a major shareholder in Kirkpatrick, the Chairman of the Board of Directors of Kirkpatrick and the Chief Executive Officer of Kirkpatrick.

17. Kirkpatrick International, a Domestic International Sales Corporation ("DISC") and wholly owned subsidiary of Kirkpatrick, was operated by DIC, Kirkpatrick and Carpenter for the benefit of Carpenter, Kirkpatrick and DIC and not for its own benefit.

18. At all times pertinent hereto, Defendant DIC was the owner of all of the shares of stock, either directly or indirectly, of Defendant Kirkpatrick and, derivatively, of Kirkpatrick International and, thereby, engaged in selling and brokering aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

19. At all times pertinent hereto, Defendant IDC was the owner of all of the shares of stock, either directly or indirectly, of Defendant DIC and, thereby, of all of the stock, either directly or indirectly, of Defendants Kirkpatrick and Kirkpatrick International and, thereby, engaged in selling and brokering aircraft equipment, parts and facilities to various airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

20. On or about January 3, 1978, Defendant Carpenter sold all of his shareholdings and equity interest in Kirkpatrick to Defendant DIC.

21. On or about January 3, 1978, Defendant Carpenter entered into a contract of employment and consulting agreement with Defendant Kirkpatrick and/or Defendant DIC (and, thereby, with Defendant IDC) whereby Defendant Carpenter agreed to remain as Chairman of the Board of Kirkpatrick and Chief Executive Officer of Kirkpatrick for a period of five years from that date.

22. At all times pertinent hereto, Defendant Carpenter acted as the agent, servant or employee of Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Krankel,

Edwards, Emro, Ruppert and of Saxon, and each of the acts of Defendant Carpenter described herein was performed by Defendant Carpenter within the course of his employment and within the scope of authority possessed by him as an employee, servant or agent of Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro, Krankel, Edwards, Ruppert, Saxon, and of NEI.

23. Defendants Krankel and Edwards, at all times pertinent hereto, acted as the agent, servant or employee of Defendants Carpenter, Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro, Ruppert and of Saxon, in connection with the transactions and unlawful payments described herein and, in so doing, acted specifically within the scope of the authority possessed by them as agents, servants or employees of such Defendants.

24. As to all of the acts and violations alleged herein, and otherwise, Defendants Kirkpatrick, Kirkpatrick International, DIC and IDC acted as a single economic enterprise based upon the following facts, among others:

(1) Kirkpatrick International, at all relevant times, upon information and belief, had Officers and Directors which were identical or nearly identical with the Officers and Directors of Kirkpatrick.

(2) Kirkpatrick International had no employees and no substantial assets of its own, even though it undertook an obligation with Nigeria for over $10,000,000.00. Instead, the Nigerian Contract (defined hereinafter) was performed by Kirkpatrick through the use of Kirkpatrick employees, funds and resources. Kirkpatrick International was severely undercapitalized for an undertaking of the magnitude of the Nigerian Contract.

(3) Kirkpatrick and Kirkpatrick International maintained consolidated financial statements and Kirkpatrick International's financial condition was not separately reported.

(4) The Board of Directors and Officers of Kirkpatrick, and not Kirkpatrick International, actively managed and conducted the affairs of Kirkpatrick International.

(5) Kirkpatrick International failed to observe, in any significant way, any corporate formalities.

(6) When Kirkpatrick International was awarded the Nigerian Contract, Kirkpatrick publicly announced that it, Kirkpatrick, had been awarded this Contract.

(7) Kirkpatrick has pled guilty to a violation of the Foreign Corrupt Practices Act with respect to the Nigerian bribes described herein, even though the Nigerian Contract was ostensibly between Kirkpatrick International and Nigeria.

(8) Kirkpatrick made substantial loans to Emro and NEI to permit Emro and NEI to perform subcontracts with Kirkpatrick International.

(9) When DIC acquired Kirkpatrick in January 1978, DIC's legal counsel and a member of its Board of Directors was placed on the Board of Directors of Kirkpatrick and has been the only Director of Kirkpatrick who has continuously remained a Director of Kirkpatrick from January 1978 to the present time.

(10) Pursuant to an agreement between Kirkpatrick and DIC, DIC has been retained as the manager of Kirkpatrick for a fee of $240,000 per year.

(11) DIC has repeatedly borrowed money from Kirkpatrick, sometimes interest-free, even though such borrowings have threatened the financial stability of Kirkpatrick.

(12) Upon information and belief, DIC has required that it approve, and has in fact approved, significant financial commitments and expenditures of Kirkpatrick, including the bribes paid to Nigerian officials through Akindele.

(13) IDC, as the owner of DIC, has operated the affairs of DIC and Kirkpatrick for its own benefit and not for the benefit of Kirkpatrick or DIC by, *inter alia*, permitting one of its owners or executives to hold or withhold significant funds of Kirkpatrick, even though such actions seriously jeopardized the financial condition of Kirkpatrick.

(14) One of IDC's principals or executives settled a large claim with a Kirkpatrick International/Kirkpatrick subcontractor, even though Kirkpatrick's Chief Executive Officer and Board did not approve or agree to such settlement, nor was such settlement in the best interest of Kirkpatrick or Kirkpatrick International.

25. In or about 1980, while acting as Chairman of the Board of Kirkpatrick and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity for Kirkpatrick or Kirkpatrick International to sell aeromedical equipment consisting of ejection set trainers, disorientation simulators and other devices to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base in Nigeria.

26. Defendant Emro, by and through the actions of its officer, agent and employee, Defendant Ruppert, as early as March 1981, and continuing thereafter into 1984, agreed to act as the designer of some or all of the equipment which was to be sold to the government of Nigeria by Kirkpatrick or Kirkpatrick International, and to provide engineering services incident to the manufacture and sale of such aeromedical equipment.

27. Defendant Saxon, acting as an officer, agent, servant and employee of NEI, caused NEI to agree as early as March 1981 that NEI would act as the manufacturer and supplier, *inter alia*, of some or all of the equipment to be sold to Nigeria by Kirkpatrick or Kirkpatrick International and agreed that NEI would perform services incident thereto.

28. At all times pertinent hereto, Plaintiff ETC was, like Defendants Kirkpatrick, Kirkpatrick International, DIC, IDC, Emro and NEI, a company engaged in the business of manufacturing and selling aircraft equipment, parts, materials and facilities to airlines and airports, including airlines and airports and national air forces having their principal place of business outside of the United States of America.

29. Specifically, at all times relevant hereto, Plaintiff ETC was engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment including, but not limited to, ejection seat trainers and disorientation simulators and the construction of aeromedical facilities.

30. In or about 1981, like Defendant Carpenter on behalf of all other Defendants and NEI, Plaintiff ETC became aware of the opportunity to sell aeromedical equipment consisting of ejection seal trainers, disorientation simulators and other devices to the Nigerian Air Force and for the Construction of an aeromedical center at Kaduna Air Force Base in Nigeria.

31. In 1981, being aware, *inter alia*, of competition provided, or to be provided, by Plaintiff ETC to the Defendants herein with respect to the opportunity for sale recited in this Complaint, Defendant Carpenter negotiated an agreement with Defendant Akindele whereby Akindele acted as the local agent of all Defendants, and each of them, in Nigeria with respect to the sale opportunity recited above.

32. In the same agreement referred to in the preceding paragraph of this Complaint whereby Akindele was retained to act as the local agent for Defendants, and each of them, in Nigeria, Defendant Carpenter, acting with the authority of, and on behalf of, Defendants, and each of them, agreed that Defendants would pay a "commission" to two Panamanian bearer share corporations named, respectively, Deriks Industrial Holding ("Deriks") and Los Holding Marketing Consultants Corporation ("Los") in an amount equal

to twenty percent (20%) of the contract price for the aeromedical equipment and aeromedical facility ultimately to be quoted to — and to be agreed to be paid by — Nigeria, the vast majority of which commission (it was orally agreed) would be paid as bribes to officials of the government of Nigeria.

33. Contracts providing for payment of the bribes by Defendants, and each of them, to and through the Panamanian bearer share corporations — Deriks and Los — were executed in or about May 1981 and Defendant Akindele thereafter began to assist Defendants, and each of them, in negotiations with various Nigerian officials for the sale of the aeromedical equipment and facility previously described, which negotiations were in direct competition with Plaintiff ETC.

34. Concurrently with the execution in May 1981 of the contracts referred to in the preceding paragraph of this Complaint, Defendants increased their bid price to the Government of Nigeria for the aeromedical equipment and facility herein described so as to include the twenty percent (20%) bribe to be paid to and through the Panamanian corporations as described above.

35. In September 1981, Defendant Akindele advised Defendant Carpenter that the twenty percent (20%) commission to be paid to the Panamanian bearer corporations described in the preceding paragraphs of this Complaint was in fact to be paid to Akindele himself and to various Nigerian political and military figures in the following proportions:

2-1/2%	-	for Akindele;
5%	-	for Air Force;
2-1/2%	-	for medical group;
5%	-	for the Party;
2-1/2%	-	for the minister himself; and
2-1/2%	-	for other key defense personnel.

Each percentage reflects the percentage of the total contract price for the sale of the aeromedical equipment and facility to the Government of Nigeria.

36. Concurrently within his advice as to the distribution of the twenty percent (20%) "commission" as described in the preceding paragraph of this Complaint, Defendant Akindele advised Defendants, and each of them, that the payments to be made to the political and military figures in Nigeria as described in the preceding paragraph of this Complaint were intended as bribes in order to insure that Defendant Kirkpatrick's nominee, Kirkpatrick International, for the benefit of all Defendants, would obtain the contract from Nigeria for the purchase of the aero medical equipment and facility and Defendants, and each of them, thereupon agreed to — and authorized — payment of these bribes.

37. Thereafter, on March 19, 1982, Nigeria signed a contract (the "Nigerian Contract") awarding the construction of the aeromedical facility and the supply of the aeromedical equipment to Kirkpatrick International which entered into such contract, and accepted the benefits thereof, both on behalf of itself and on behalf of all Defendants. Attached hereto, incorporated herein and marked Exhibit "A" is a true and correct copy of the Nigerian contract.

38. The price agreed to be paid by Nigeria for the equipment and facility pursuant to the Nigerian Contract included the bribe(s) described in the preceding paragraphs of this Complaint.

39. Prior to the award of the subject contract, Plaintiff ETC negotiated with and submitted its bid to Nigeria for, the aeromedical facility in direct competition with Defendants, and was under active consideration by Nigeria for award of the Nigerian Contract, but the bid was not accepted by Nigeria because of the bribes which were paid and which were agreed to be paid by Defendants, as aforesaid. ETC was capable of performing and prepared to perform on the contract awarded to Kirkpatrick International by Nigeria.

40. Absent the payment of bribes by Defendants, as described herein, and absent the agreement of the Defendants to pay such bribes, upon information and belief, the Nigerian Contract would have been awarded to ETC and not to Kirkpatrick International.

41. Upon the execution by Nigeria of the Nigerian Contract on or about March 19, 1982 as described in the preceding paragraphs of this Complaint, Plaintiff ETC lost and was deprived of the commercial opportunity to supply the aeromedical equipment and to construct the aeromedical facility as to which it had been in direct competition with Defendants prior thereto.

42. Thereafter, in September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of the Nigerian Contract.

43. Immediately thereafter, on September 30, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amounts of $117,920.34 and $193,657.70 to be made, respectively, to the Panamanian corporation Deriks and to the Panamanian corporation Los and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and to the Nigerian political and military figures in the proportions described in paragraph 35 of this Complaint.

44. The payments made on September 30, 1982 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the initial payment made by Nigeria in September 1982 on the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

45. On December 21, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $290,486.50 to be

made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

46. The payments made on December 21, 1982 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the payments theretofore made by Nigeria pursuant to the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

47. On February 2, 1983, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $145,243.27 to be made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

48. The payments made on February 2, 1983 as described in the preceding paragraphs of this Complaint constituted approximately twenty percent (20%) of the payments theretofore made by Nigeria pursuant to the March 19, 1982 contract and were made by Defendants pursuant to the Nigerian Contract and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

49. On August 8, 1983, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $290,486.50 to be made to each of the Panamanian corporations — Deriks and Los — and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions as described in paragraph 35 of this Complaint.

50. The payments made on August 8, 1983 as described in the preceding paragraphs of this Complaint constituted the balance of approximately twenty percent (20%) of the total purchase price paid by Nigeria pursuant to the Nigerian Contract and were made by Defendants pursuant to the contract of May 1981 and the understandings of September 1981 as set forth in the preceding paragraphs of this Complaint.

IV. THE ENTERPRISES

51. Deriks is a Panamanian corporation which was engaged in, and the activities of which affected, both interstate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

52. Los is a Panamanian corporation which was engaged in, and the activities of which affected, both interstate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

53. Defendants Carpenter, Akindele, Kirkpatrick, DIC, IDC, Emro, Krankel, Ruppert, Saxon and Kirkpatrick International are an association in fact of individuals and corporations within the meaning of 18 U.S.C. §1961(4), which enterprise was engaged in, and the activities of which affected, both interstate and foreign commerce.

54. Kirkpatrick International is a New Jersey corporation engaged in, and the activities of which affect both interestate and foreign commerce and thus constitutes an enterprise within the meaning of 18 U.S.C. §1961(4).

V. THE RACKETEERING ACTIVITIES

55. The acts of Defendants, and each of them, as described in the preceding paragraphs of this Complaint constitute racketeering activities as defined by Section 1961(1)

of Title 18 of the United States Code, both generally and in the following particular respects:

(a) each of the payments made to each of the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes, depending upon the method by which each payment was made, a violation of 18 U.S.C. §1341 (relating to mail fraud) and/or Title 18 of the United States Code §1343 (relating to wire fraud) in that the mails or wires were used or were caused to be used in furtherance of a scheme or artifice to defraud and/or to obtain money or property by means of false or fraudulent pretense or representations;

(b) each of the payments made to the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes an act involving bribery chargeable under the laws of the State of New Jersey and punishable by imprisonment for more than one year; and

(c) each of the payments made to the Panamanian corporations on September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983 constitutes a violation of Title 15 of the United States Code §78 (dd-1) relating to foreign corrupt practices by issuers of securities and, hence, constitutes an act of fraud in the sale of securities.

56. The acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint, constitute "racketeering activity" as defined by N.J.S.A. §2C:41-1, *et seq.*, both generally and in the following particular respects:

(a) conduct defined as racketeering activities under Title 18 of the United States Code §§1961(1)(A), (B) and (D); and

(b) bribery.

56. The acts which constitute racketeering activities set forth above constitute a pattern of racketeering activity within the meaning of Section 1961(5) of Title 18 of the United States Code and N.J.S. 2C:41-1d, all of which occurred after June 15, 1981 and within a ten year period.

57. Upon information and belief, the affairs of the enterprises were also conducted through a pattern of racketeering activities with similar purposes, results, participants, victims and methods of commission in that Kirkpatrick International had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian Contract through foreign official bribery constituting one or more violations of the mail and wire fraud statutes, 18 U.S.C. 18 U.S.C. §1341, 1343, and the Foreign Corrupt Practices Act, 15 U.S.C., §78 (dd-1).

58. The acts of the Defendants, and each of them, as set forth in the preceding paragraphs of this Complaint, were acts which caused and permitted Defendants, and each of them, through a pattern of racketeering activity, to acquire and/or to maintain, directly or indirectly, interests in and control over each of the enterprises described in the preceding paragraphs of this Complaint, including the Panamanian corporations Deriks and Los, the association in fact of individuals and corporations described in paragraph 53 above, and Kirkpatrick International, as well as the Defendant corporations themselves, all in violation of Section 1962(b) of Title 18 of the United States Code and of N.J.S. 2C:41-2b.

59. The Defendants, and each of them, through the acts set forth above, conducted and/or participated, directly and/or indirectly, in the conduct of, the affairs of the enterprises identified in the preceding paragraphs of this Complaint, including the Panamanian corporations Deriks and Los, the association in fact of individuals and corporations described in paragraph 53, above, Kirkpatrick International, as well as the Defendant corporations themselves, through a pattern of racketeering activity at a time and under circumstances when Defendants, and each of them, was employed by and/or

associated with each such enterprise, all in violation of 18 U.S.C. 1962(c) and N.J.S. 2C:41-2c.

60. By engaging in the acts as set forth in the preceding paragraphs of this Complaint Defendants, and each of them, conspired to violate 18 U.S.C. §§1962(b) and (c), all in violation of 18 U.S.C. §1962(d) and in violation of N.J.S.A. 2C:41-2d.

COUNT I

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

61. Plaintiff ETC incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

62. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of Sections 1962(b), (c) and (d) of Title 18 of the United States Code, Plaintiff ETC has been damaged in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits are in the approximate amount of Three Million Dollars ($3,000,000.00) and which failure to be awarded the Nigerian Contract was caused solely and proximately by the racketeering activities committed by the Defendants as described in this Complaint.

63. By virtue of the damage to its business and property as set forth in the preceding paragraph of this Complaint, Plaintiff ETC, pursuant to Section 1964(c) of Title 18 of the United States Code, is entitled to an award of damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit, including a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., DIC (Holding), Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

COUNT II

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC. DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

64. Plaintiff ETC incorporated herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

65. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of N.J.S.A. 2C:41-4(b) and (d), Plaintiff ETC has been damaged in its business and property including, but not limited to, lost profits arising from

ETC's failure to be awarded the contract for the supply of aeromedical equipment to and the construction of an aeromedical facility for Nigeria which lost profits constitute the approximate amount of Three Million Dollars ($3,000,000.00) and which failure to be awarded the Nigerian contract was caused solely and proximately by the acts of bribery and racketeering activities committed by the Defendants as described in this Complaint.

66. By virtue of the damage to its business and property as set forth in the preceding paragraph of this Complaint, Plaintiff ETC claims, pursuant to N.J.S. 2C:41-5c, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit, including a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., DIC (Holding) Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

COUNT III

ENVIRONMENTAL TECTONICS CORPORATION V. W.S. KIRKPATRICK & CO., INC.; W.S. KIRKPATRICK & CO. INTERNATIONAL; DIC (HOLDING), INC. AND INTERNATIONAL DEVELOPMENT CORPORATION, S.A.

67. Plaintiff ETC incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

68. ETC is and was a competitor of each corporate Defendant and thus is a member of the class of persons which was intended to be protected by 15 U.S.C. §13(c).

69. By virtue of the acts of bribery set forth in the preceding paragraphs of this Complaint, Defendant W.S. Kirkpatrick & Co., Inc. and W.S. Kirkpatrick & Co. International, DIC (Holding), Inc. and International Development Corporation, S.A., and each of them, paid and granted a commission, brokerage or other compensation in connection with the sale or purchase of goods, wares or merchandise to the agent, representative or other intermediary of the other party to such transaction, to wit, Nigeria, all in violation of Section 13(c) of Title 15 of the United States Code.

70. By virtue of the acts of the Defendants, and each of them, as described in the preceding paragraphs of this Complaint which constitute violations of Section 13(c) of Title 15 of the United States Code, Plaintiff ETC has been injured in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits constitute the approximate amount of Three Million Dollars ($3,000,000.00) and which failure was caused solely and proximately by those acts committed by the Defendants as described in this Complaint.

71. By virtue of the injury to its business and property as set forth in the preceding paragraphs of this Complaint, Plaintiff ETC claims, pursuant to Section 13(c) of Title 15 of the United States Code, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against W.S. Kirkpatrick & Co., Inc., W.S. Kirkpatrick & Co. International, DIC (Holding), Inc. and International

Development Corporation, S.A., and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT IV

ENVIRONMENTAL TECTONICS CORPORATION V. DIC (HOLDING), INC. INTERNATIONAL DEVELOPMENT CORPORATION, S.A., HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON AND R.H. EDWARDS

72. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

73. Each of the Defendants named in this Count IV combined, conspired and confederated with each other, with Kirkpatrick, with Kirkpatrick International, and with other persons whose identities are currently unknown to Plaintiff, to engage in the acts constituting bribery so that Kirkpatrick International could gain the contract for the supply of aeromedical products and the construction of an aeromedical facility for Nigeria, and so that each of the Defendants named in this Count IV could profit thereby.

74. Each of the conspirators named herein acted in violation of 15 U.S.C. §13(c) by engaging in this conspiracy.

75. By virtue of the acts of each of the conspirators named in this Count IV, as described herein, and as described in the preceding paragraphs of this Complaint, Plaintiff has been injured in its business and property including, but not limited to, lost profits arising from ETC's failure to be awarded

the contract for the supply of aeromedical equipment and the construction of an aeromedical facility in Nigeria, which lost profits constituted the approximate amount of Three Million Dollars ($3,000,000.00) and which failure was caused solely and proximately by the acts of bribery committed by Kirkpatrick, Kirkpatrick International and the conspirators named in this Count IV, all as described in this Complaint.

76. By virtue of the injury to its business and property as set forth in the preceding paragraphs of this Complaint, Plaintiff ETC claims, pursuant to Section 13(c) of Title 15 of the United States Code, damages in the amount of Nine Million Dollars ($9,000,000.00) plus costs of suit and a reasonable attorney's fee.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants DIC (Holding), Inc., International Development Corporation, S.A., Harry G. Carpenter, Benson "Tunde" Akindele, John M. Krankel, Emro Engineering Co., Inc., Robert W. Ruppert, Ross E. Saxon and R.H. Edwards, and each of them, both jointly and severally, in the amount of Nine Million Dollars ($9,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT V

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. EMRO ENGINEERING CO., INC. AND ROBERT W. RUPPERT

77. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

78. During the period of time when Kirkpatrick International's bid to Nigeria was under consideration by Nigeria, ETC was actively pursuing contract discussions and

negotiations with officials, agents and representatives of Nigeria.

79. In connection with ETC's activities described in the foregoing paragraph of this Complaint, ETC's representative William Mitchell travelled to Nigeria and engaged in contract discussions and negotiations.

80. Shortly after William Mitchell travelled to Nigeria, Emro, acting through its corporate President, Defendant Ruppert, authored and published a letter to Group Captain Isaac A. Odeh, Director of Medical Services, Ministry of Defense, Lagos, Nigeria, dated December 10, 1981 (the "Letter"). Attached hereto, incorporated herein and marked Exhibit "B" is a true and correct copy of the Letter.

81. The Letter contained false and misleading representations concerning ETC. Among other things, the Letter inaccurately stated: (1) that Emro had terminated ETC as its sales representative; (2) that ETC had previously misrepresented itself as designer and manufacturer of Emro products; and (3) that the aforesaid termination involved "dishonest conduct" by ETC.

82. Defendants Emro and Ruppert knew these misrepresentations to be false when Ruppert, acting on his own behalf and on behalf of Emro, made these misrepresentations, and these misrepresentations were made without any lawful privilege.

83. These misrepresentations constitute defamation *per se* and libel *per se*.

84. ETC came to learn of the Letter, and the contents thereof, in or about May 1986 when a copy of such letter was surrendered to ETC by Kirkpatrick.

85. The libelous statements contained in Exhibit "B" hereto proximately caused injury to ETC.

86. The actions of Emro and Ruppert as set forth in this Count V were undertaken maliciously, with actual knowledge of the falsity of the misrepresentations in the Letter, with reckless disregard for the truth of such representations, and an award of punitive damages should be made against Emro and Ruppert, and each of them, so that they, and all those that come to learn of this conduct and any punitive damages awarded hereon, should never again engage in such conduct.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants Emro Engineering Co., Inc. and Robert W. Ruppert, and each of them, both jointly and severally, in the amount of Three Million Dollars ($3,000,000.00), plus punitive damages and costs of suit.

COUNT VI

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. EMRO ENGINEERING CO., INC. AND ROBERT W. RUPPERT

87. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

88. Through the misrepresentations contained in the Letter, Defendants Emro and Ruppert improperly interfered with ETC's prospective contract relations with Nigeria.

89. The actions of Emro and Ruppert complained of in this Count VI were undertaken with malicious intent and such actions transgressed generally accepted standards of morality.

90. Defendants Emro and Ruppert engaged in this intentional interference with prospective contract relations without just or proper cause and were not privileged so to do.

91. As the direct and proximate result of the intentional interference with prospective contract relations alleged in this Count VI, Defendants Emro and Ruppert solely and proximately damaged ETC by depriving ETC of profits in the approximate amount of Three Million Dollars ($3,000,000.00) which profits would have been achieved by ETC had it been awarded the contract with Nigeria.

WHEREFORE, Plaintiff respectfully prays that this Court enter its judgment in favor of ETC and against Defendants Emro Engineering Co., Inc. and Robert W. Ruppert, and each of them, both jointly and severally, in the amount of Three Million Dollars ($3,000,000.00), plus costs of suit including a reasonable attorney's fee.

COUNT VII

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL V. W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, HARRY G. CARPENTER, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, W.S. KIRKPATRICK & CO. INTERNATIONAL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON, AND R.H. EDWARDS

92. Plaintiff incorporates herein by reference, as fully as if set forth at length herein, all of the foregoing paragraphs of this Complaint.

93. By the payment of the bribes and the agreement to pay bribes to Nigerian officials in connection with the Nigerian Contract, the Defendants, and each of them, with malicious intent and without justifiable cause, improperly interfered with ETC's prospective contract relations with Nigeria.

94. Defendants' actions as aforesaid solely and proximately damaged ETC and ETC thereby suffered lost profits in the approximate amount of $3,000,000.00.

95. The actions of Defendants, and each of them, both jointly and severally, were criminal in nature, were undertaken with the intent to unlawfully benefit Defendants and were undertaken to deprive Defendants' competitors (such as ETC) of the opportunity to compete fairly for the Nigerian Contract; therefore, punitive damages should be imposed upon Defendants, and each of them, so that Defendants, and all those who learn of this conduct and any punitive damages awarded hereon, should never again engage in such conduct.

WHEREFORE, Plaintiff requests this Court to enter judgment in favor of Environmental Tectonics Corporation, International, in the amount of Three Million Dollars ($3,000,000.00), plus punitive damages, interest, costs of suit, and a reasonable attorney's fee, against each Defendant, both jointly and severally, and brings this action to recover same.

RUTTER, TURNER & STEIN

By_____
Thomas B. Rutter
872 Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 925-9200

By_____
Alan Turner
209 Haddon Avenue
Haddonfield, NJ 08033
(609) 429-6022

Counsel for Plaintiff

THIS AGREEMENT made this 19th day of March, 82 BETWEEN ALHAJI AKANBI ONIYANGI, Minister of Defense, Ministry of Defense, Lagos, for and on behalf of the Government of the Federal Republic of Nigeria (hereinafter referred to as "Buyer") of the one part,

AND

W.S. KIRKPATRICK & CO. INTERNATIONAL, a corporation of the State of New Jersey, U.S.A. 22, Audrey Place, Fairfield New Jersey, represented by HARRY CARPENTER (hereinafter referred to as "the Seller") on the other part.

WHEREAS the Buyer is desirous of purchasing Devices and Spares for an Aeromedical Facility including a Hyperbaric Chamber system, Hypobaric (Altitude) Chamber System, vertifuge, centrifuge, and various related Equipment, including total technical services to install and operate the systems (hereinafter referred to as 'the Equipment and the Services') of the Nigerian Airforce.

WHEREAS the Buyer has requested to buy equipments and services listed in Appendix 1.

AND WHEREAS the Seller has agreed to sell the equipments and services on the terms and conditions set forth in this Agreement through the primary manufacturers, NAUTILUS ENVIRONMENTALS, INC., and EMRO ENGINEERING, COMPANY INC. on the understanding that the Buyer accepts the Seller's declaration that the Seller and its agents have no business connection with South Africa or any of its agents.

NOW THIS AGREEMENT WITNESSETH as follows:

ARTICLE 1
OBJECT OF THE AGREEMENT

1.1 This Agreement is to provide for the terms and conditions under which the Buyer shall buy from the Seller the equipments and services stated hereunder. a) Physiological Training Unit Equipment listed in Appendix 1 to this Agreement for the Nigerian Airforce aeromedical Centre, Kaduna b) Installation Assembly and Test of the Equipment c) Training of Nigerian Airforce Personnel d) Maintenance Services of the Equipment

ARTICLE II
CONTRACT PRICE

2.1 The total contract price for the equipments and services to be provided by W.S. Kirkpatrick and its sub-contractors (as provided for in Appendix l) shall be U.S. $10,835,048.75 (Ten Million, Eight Hundred and Thirty-Five Thousand, Forty-Eight U.S. Dollars, Seventy-Five Cents).

ARTICLE III
TERMS OF PAYMENT

3.1 The Buyer shall pay the sum of U.S. $10,258,515.50 (Ten Million, Two Hundred and Fifty-Eight Thousand, Five Hundred and Fifteen Dollars Fifty Cents) being the sum payable in foreign currency cut of the Contract price referred to in Appendix 1 as follows:

PAYMENT FOR EQUIPMENTS

3.2 Within forty-five days after signing of the Agreement, the Buyer shall pay the sum of U.S. $1,936,577.00 (One Million Nine Hundred and

Thirty-Six Thousand Five Hundred and Seventy-Seven Dollars) which represents 20% (Twenty percent of the total F.O.B. cost of materials and spare parts referred to in Appendix 1 of this Agreement by direct transfer to the Seller's nominated account. This down-payment shall be secured by a bank guarantee to be valid for a period of 18 (eighteen) months and furnished by the Seller to the Buyer.

3.3 Within forty five (45) days after the signing of this Agreement the Buyer shall open in favour of the Seller, an irrevocable documentary Letter of Credit for the sum of U.S. $38,321,938.50 (Eight Million, Three Hundred and Twenty-One Thousand, Nine Hundred and Thirty-Eight Dollars Fifty Cents) [sic] being the balance of the amount payable in foreign currency as specified in the foregoing paragraphs and Appendix lB annexed hereto.

3.3(i) At One Hundred and Fifty (150) days from the date of Down-Payment, a progress payment of U.S. $2,904,865.50 (Two Million, Nine Hundred and Four Thousand, Eight Hundred and Sixty Five Dollars Fifty Cents) being Thirty per cent (30%) of U.S. $9,682,885.00 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare Parts shall be made against submission of Sight Draft by Kirkpatrick accompanied by approved Certificate of Valuation of work done to be issued by the Director of NAF Medical Services and Air Officer Logistics.

3.3(ii) At Two Hundred and Seventy (270) days from the date of Down-Payment, a progress payment of U.S. $1,452,432.75 (One Million, Four Hundred and Fifty-Two Thousand Four Hundred and Thirty-Two

Dollars and Seventy-Five Cents) being Fifteen per cent (15%) of U.S. $9,682,885.00 (Nine Million, Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare parts, shall be made after Hydrostatic Test on the Hyperbaric Chamber System and Hypobaric Chamber System Pressure Vessels, upon presentation of a Sight-Draft by Kirkpatrick, accompanied by an approved Certificate of Valuation of work done to be issued by the Director of NAF Medical Services and Air Officer Logistics.

3.3(iii) A further payment of U.S. $1,939,577.00 (One Million, Nine Hundred and Thirty-Six Thousand Five Hundred and Seventy-Seven Dollars) being Twenty percent (20%) of U.S. $9,682,885.00 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of Equipments and Spare Parts shall be made upon presentation of a Sight-Draft by Kirkpatrick accompanied by:

a) Commercial Invoice
b) Packing List and Certificate of Origin
c) Bill of Lading
d) Certificate of SGS Inspection. The Inspection Certificate to be issued shall cover the total value of the Equipment and Spare Parts taking into account the stage of payments already made.

3.3(iv) Upon arrival of Equipment and Spare Parts at the site in Kaduna a further payment of U.S. $968,288.50 (Nine Hundred and Sixty-Eight Thousand Two Hundred and Eighty-Eight Dollars and Fifty Cents) being Ten percent (10%) of U.S. $9,682,885.00 (Nine Million, Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars)

being FOB cost of Equipment and Spare Parts shall be made upon presentation by Kirkpatrick of a Sight-Draft accompanied by:

a) Commercial Invoices
b) Bill of Lading
c) Packing List and Certificate of Origin
d) Certificate of SGS Inspection. Certificate shall cover the total value of the equipment and spares taking into account the instalmental payments already made.

3.3(v) A final payment of $484,144.25 (Four Hundred and Eighty-Four Thousand, One Hundred and Forty-Four Dollars and Twenty Five Cents) (5%) five percent of $9,682,885 (Nine Million Six Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Five Dollars) being FOB cost of equipments and spare parts shall be made 12 (twelve) months from the date of installation and on expiration of the guarantee period upon presentation by Kirkpatrick of sight draft accompanied by Certificate of Acceptance issued by the Buyer's representatives.

3.3(vi) *PAYMENT FOR FREIGHT CHANGES*

The Buyer shall reimburse the Seller for the cost of freight charges on the equipment to Nigeria on presentation of relevant shipper's invoices.

3.3(vii) *PAYMENT FOR SERVICES*

At 120 days from date of Down Payment, a payment of Technical Services for submission of the Training plan in the amount of $134,062.50 (One Hundred and Thirty-Four Thousand, Sixty-Two Dollars, Fifty Cents) 80% (eighty per cent) of U.S. $167,578.00 (One Hundred and Sixty-Seven Thousand, Five Hundred and Seventy-Eight Dollars) being cost of training to be carried out in U.S.A shall be made

against presentation by Kirkpatrick of sight draft accompanied by Certificate issued by Buyer's representatives confirming receipt of the training plan.

3.3(viii) Upon completion of the 30 day period for training of NAF personnel in U.S.A., a payment of Technical Services of $33,515.50 (Thirty-Three Thousand, Five Hundred and Fifteen Dollars Fifty Cents) 20% (Twenty per cent) of U.S. $167,578.00 (One Hundred and Sixty-Seven Thousand, Five Hundred and Seventy-Eight Dollars) being cost of training to be carried out in U.S.A. shall be made against presentation by Kirkpatrick of sight draft accompanied by Certificate from Buyer's representatives that U.S.A. training has been satisfactorily completed.

3.3(ix) *PAYMENT FOR CRATING INLAND DELIVERY FROM FACTORY TO U.S. PORTS; INSURANCE FROM FACTORIES TO PORT; FREIGHT CHARGES*

Payment of U.S. $298,365.00 (Two Hundred and Ninety-Eight Thousand, Three Hundred and Sixty-Five Dollars) for the above charges shall be made out of the Letter of Credit on submission of Shipper's Invoice and copies of relevant commercial Invoice and Bill of Lading.

3.3(x) *PAYMENT FOR ASSEMBLY, INSTALLATION AND TEST*

The sum of U.S. $65,812.50 (Sixty-Five Thousand, Eight Hundred and Twelve Dollars, Fifty Cents) offshore being Thirty Percent (30%) of U.S. $217,735 (Two Hundred and Seventeen Thousand, Seven Hundred and Thirty-Five Dollars) for assembly, installation and test against presentation by

Seller of a Certificate duly signed by the Director NAF Medical Services and Air Officer Logistics confirming acceptance of Equipments as being assembled, installed and tested.

3.3(xi) *PAYMENT FOR MAINTENANCE SERVICES*
The sum of U.S. $43,875.00 (Forty-Three Thousand, Eight Hundred and Seventy-Five Dollars) being part payment for the Maintenance shall be paid to the Seller in foreign currency on arrival in Nigeria of the Maintenance Engineer, as shall be confirmed in a letter signed by the Director NAF Medical Services.

ARTICLE IV
PAYMENT IN MAIRA

4.1 In addition to the above payments, the Buyer shall pay a sum of U.S. $576,533.25 (Five Hundred and Seventy-Six Thousand, Five Hundred and Thirty-Three Dollars, Twenty-Five Cents) in its equivalent conversion rate in Nigeria Currency in the manner herein provided.

4.2 *PAYMENT FOR TRAINING IN NIGERIA*
Upon commencement of training in Nigeria, a sum of U.S. $50,273.50 (Fifth [sic] Thousand, Two Hundred and Seventy-Three Dollars, Fifty Cents) representing part of the total training cost as specified in Appendix 1 (c) shall be paid in its equivalent Nigerian Currency upon presentation by the Seller to the buyer of a letter from NAF Director of Medical Services and Air Officer Logistics signifying that training had commenced in accordance with the provision of this agreement.

4.3 Upon completion of the 90-day training period in Nigeria, the sum of U.S. $50,273.50 (Fifty

Thousand, Two Hundred and Seventy-Three Dollars Fifty Cents) representing the balance of payment in respect of the training cost in Nigeria as provided in Appendix I(C) to this agreement shall be paid in its equivalent Nigerian Currency on presentation by the Seller to the Buyer of a letter duly signed by the NAF Director of Medical Services and Air Officer Logistics signifying that the training had been completed in accordance with the provisions of this agreement.

4.4 *PAYMENT FOR INSTALLATION, ASSEMBLY AND TEST IN NIGERIA*

After arrival of Material at Kanduna Site, and at the beginning of installation, a payment of U.S. $43,875.00 (Forty-Three Thousand, Eight Hundred and Seventy-Five Dollars) being Twenty Percent (20%) of payment for assembly, installation and test shall be paid in Nigeria in its equivalent Nigerian Currency by the Seller on presentation of a Certificate signed by the Director of Medical Services and Air Officer Logistics that the equipments have been deposited in Kaduna, and installation was to commence.

4.5 Upon assembly, installation and test of the equipments, a payment of U.S. $109,687.50 (One Hundred and Nine Thousand, Six Hundred and Eighty-Seven Dollars Fifty Cents) shall be paid in its equivalent Nigerian Currency against presentation by the Seller of a Certificate from the Buyer confirming acceptance of the equipment as being assembled, installed and tested.

4.6 The part payment as the sum of U.S. $102,375.00 (One Hundred and Two Thousand, Three Hundred and Seventy-Five Dollars) for maintenance Services as contained in Appendix 1 shall be paid in the

equivalent Nigerian Currency in three installments as follows:

(i)	US $20,475	in advance
(ii)	US $40,950	at the 181st (One Hundred and Eighty First) day
(iii)	US $40,950	on the completion of the Maintenance.

The second and third installments shall be made after certification by NAF Director of Medical Services and the Air Officer Logistics that the Maintenance Services have been performed satisfactorily.

PAYMENT IN NIGERIA FOR INSURANCE PORTS HANDLING CHARGES AND LOCAL TRANSPORT CHARGES TO SITE

4.7 A payment of the equivalent of $149,718.75 (One Hundred and Forty-Nine Thousand, Seven Hundred and Eighteen Dollars, Seventy-Five Cents) shall be paid in Naira in Lagos against submission of Bills and Receipts and Invoices by Ben-Reubens (Nig) Ltd. to the Buyer covering insurance from USA To Lagos, and insurance from Lagos to Kaduna, all coverage provided by NICON. If the actual insurance cost is higher than $149,718.75 (One Hundred and Forty-Nine Thousand, Seven Hundred and Eighteen Dollars, Seventy Five Cents) the full cost shall be reimbursed to Ben-Reubens (Nig) Ltd. as certified by NICON.

4.8 A payment of the equivalent of $70,330.00 (Seventy Thousand, Three Hundred and Thirty Dollars) shall be paid in Naira in Lagos against submission of invoices receipt Bills etc. by Ben-Reubens (Nig) Ltd. to the Buyer covering unloading charges in the port of Lagos plus motor transport to Kaduna.

ARTICLE V
SUBMITTALS OF DOCUMENTATIONS

5 The parties agree that an integrated delivery schedule is necessary to insure that the work proceeds in a timely manner. The Seller agrees to submit, or has submitted documentation necessary to fulfill this Agreement as follows:

A.	Arrangement of Equipment	Submitted 3/23/82
B.	Critical Dimensions	Submitted 3/23/81
C.	Structural General	Submitted 3/23/81
D.	Electrical Requirements (preliminary)	Submitted 3/23/81
E.	Water Requirements (preliminary)	Submitted 3/23/81
F.	Connection to building utilities	Contract + 60 days
G.	Compressed Air Piping	Contract + 60 days
H.	Medical Gas Piping	Contract + 60 days
I.	Vacuum System Piping	Contract + 90 days
J.	Equivalent Foundation Details	Contract + 60 days
K.	Equivalent Installation Drawings	Contract + 90 days
L.	Manufacturers Schedule of Events/Progress	Contract + 75 days
M.	Testing Schedule	Contract + 150 days
N.	Electrical Requirements	Contract + 60 days
0.	Water Requirements	Contract + 60 days
P.	Training Plan	Contract + 120 days
Q.	Itemized Spare parts data	Contract +60 days
R.	Installation Schedule	Contract +150 days

ARTICLE VI
SITE INSPECTION

6 Approximately 150 (One Hundred and Fifty) days after award of contracts two (2) representatives of the Buyer shall in company with the Seller's representative, visit the major manufacturers' site to view contractual progress. During this visit, they shall inspect and certify the state of production progress of major manufacturers (NAUTLIUS AND EMRO), shall certify the physical presence of production materials, the placement of purchase orders, the state of engineering drawings and materials, and visit new sub contract work sites. Said representatives must have authority to issue approval certificate to enable the prime contractor to receive 150 (One Hundred and Fifty) days progress payment. At approximately 270 (Two Hundred and Seventy) days from date of contract, a representative of the Buyer shall visit NAUTLIUS in HOUSTON, TEXAS, U.S.A., to witness the hydrostatic test of the Hyperbaric Chamber System and Hypobaric pressure vessels. Said representative must have authority to issue approval certificate to enable contractor to receive 270 (Two Hundred and Seventy) days progress payment.

ARTICLE VII
TAXES, PERMITS AND FEES

7 The Seller's prices as set forth in Article iii hereof exclude all taxes such as, but not limited to, local, state or federal including those incurred by sub-vendors, or materials incorporated in the WORK, and also exclude the cost of the fees, for all permits, licenses and registrations, duties, import fees, inspection including but not limited to those

performed by the Societe General de Surveillance S.A. on behalf of the Federal Republic of Nigeria, harbour fees or demurrage whether special or general, which may be required for any of its sub-contractors by the Federal Government of Nigeria, and/or by any state of municipal governmental body, to the extent such taxes, costs, duties or fees apply to the WORK. The Seller shall not be responsible for payment of any such fees. The Seller shall assist the Buyer by making all necessary information and documentation in its possession available for applications for processing and obtaining all such permits, licenses etc. Airport duty free certificates should be issued by buyers to sellers.

7.2 All taxes, duties, dues, charges and levies outside the Federal Republic of Nigeria to which the Seller is liable in connection with the contract shall be borne by the Seller.

ARTICLE VIII
CONFIDENTIALITY

8 All drawings, specifications, data, manual and similar material or copies thereof furnished by the Seller to the Buyer shall remain the confidential property of the Seller and shall not be shown or permitted to be shown, copies or permitted to be copied or disclosed to third parties for a period of five (5) years from the Date of Acceptance by the Buyer of the WORK, and use thereof shall be restricted solely to operation and maintenance purposes by the Buyer and its employees.

ARTICLE IX
AVAILABILITY OF SITE

9.1 The Buyer shall erect and provide at its sole cost and expense the building and interfacing services which will house the systems to be supplied by the Seller. The parties recognise [sic] that it is essential for the timely delivery by the seller that the building be available to receive the systems when the systems are delivered to Nigeria. In the event that the buyer fail to provide access to the building the seller shall be entitled to invoke the Force Majeure provisions of this contract and, in addition, any and all costs.

ARTICLE X
DELIVERY

10.1 Delivery shall commence 26 (twenty-six) weeks after the date of signing of the Agreement and shall be completed about 54 (fifty-four) weeks from the commencement of the Agreement.

ARTICLE XI
TRAINING

11.1 The Seller shall conduct operational (functional user) training for 7 (seven) NAF personnel, 2 (two) electronic technicians, 2 (two) electricians and 3 (three) medical personnel for 30 (thirty) days in the U.S.A. Emphasis during the training shall be on safety adherence to procedure and emergency action. The Seller shall also conduct maintenance course on all the equipments for NAF personnel in Nigeria for a period of at least 90 (ninety) days. The Buyer shall bear the cost of tickets of trainees while the Seller shall provide subsistence.

ARTICLE XII
BREACH

12 In the event that either party shall commit or permit a breach of any material part of this Agreement, the other party shall have the right to terminate the Agreement by notice in writing to the part in default PROVIDED that if such party shall make good the breach to the satisfaction of the other within sixty (60) days after, such notice shall be deemed to be void and of no effect.

ARTICLE XIII
MARKINGS

13 The boxes containing the equipment and spares being imported under this agreement shall be marked as follows:

The Permanent Secretary,
Ministry of Defence,
P.M.B. 12590,
LAGOS, NIGERIA.
(NIGERIAN AIR-FORCE AEROMEDICAL CENTRE EQUIPMENT)

ARTICLE XIV
GUARANTEE

14.1 The Seller guarantees the good functioning of the equipment supplied hereunder for a period of twelve (12) months from the date of installation.

14.2 If any of the goods supplied by the Seller is found to be defective as a result of the material used or bad workmanship within a period of twelve (12) months from the date of installation the Seller shall at their own expense replace in whole or repair the goods.

14.3 The Seller also guarantees for the same period mentioned in this Article against any defects or damage except those attributable to the Buyer or his agents.

14.4 Any goods replaced under this Article shall have its guarantee period extended by twelve (12) months from date of replacement.

ARTICLE XV
GUARANTEE OF AVAILABILITY OF SPARES AND ACCESSORIES

15 Seller hereby undertakes to guarantee supply to the Buyer of fast moving spare parts. In addition, Seller guarantees availability of spare parts for the first ten (10) years immediately following the completion of delivery of the systems and other equipments.

ARTICLE XVI
WARRANTY

16 The Seller shall assign to the Buyer any and all warranties that it shall receive from the primary manufacturers. The Seller warrants that the systems and Equipment furnished pursuant to this contract shall be in good working order and made of first class materials. This warranty shall cover workmanship and be valid thirty (30) calendar months from date of the execution of this Agreement but in no case longer than a period of twelve (12) months from the date any item of Equipment is installed and placed into service by the Buyer. This warranty shall not be extended and shall not be subject to extension by reasons of Force Majeure.

ARTICLE XVII
PATENTS

17 The Seller shall indemnify, hold harmless and defend the Buyer from and against any and all suits, legal proceedings, claims, royalties, license fees, demands, damages, costs and attorneys' fees incident to any infringement or to any claimed infringement of any United States patent by the equipment or apparatus per sold by the Seller hereunder; PROVIDED (a) prompt written notice by the Buyer is given to the Seller as soon as the Buyer acquires knowledge of any such suit, proceedings, claim or demand and an opportunity be afforded the Seller to settle or defend the same in such manner as the Seller deems advisable and (b) the same may be defended or settled in the Buyer's name, if necessary, and (c) every reasonable assistance which the Seller requires in so defending or settling shall be rendered to the Seller by the Buyer, and (d) this covenant to indemnify is not intended and does not apply to any process used by the Buyer nor to any product produced by the Seller which is outside this Agreement. In the event that the said Equipment or apparatus is, in any suit, held to constitute an infringement and as a result the use thereof is prevented, then the Seller, if unable within a reasonable time to secure for the Buyer the right to continue using the said Equipment or apparatus, either by suspension of the injunction or by securing for the Buyer a license or otherwise, shall at its own expense either replace the said Equipment or apparatus with non-infringing Equipment or apparatus, or modify the said Equipment or apparatus so that the same becomes non-infringing.

ARTICLE XVIII
FORCE MAJEURE

18 Should either party to this Agreement fail to comply with any of the provisions herein contained by reason of Force Majeure, such failure should not be regarded as a breach of such provisions of the Agreement. For the purpose of this agreement, Force Majeure shall be construed as events, or circumstances beyond the control of either party, unforeseen and unavoidable including acts of God, or war, revolution, fires other than caused by negligence of the seller, extraordinary floods, epidemics, quarantine restrictions, national strikes arising after the coming into force of this Agreement which prevents the implementation of the obligations either totally or partially. The party claiming Force Majeure shall inform the other party in writing within thirty (30) days of the commencement of Force Majeure. Force Majeure shall automatically extend the terms of this Agreement by the duration of the Force Majeure. If Force Majeure continues for a period of three (3) months, the parties shall hold consultations regarding the appropriate stops to be taken to achieve the purpose of this Agreement.

ARTICLE XIX
DEFAULTS AND DAMAGES

19 In the event that either party shall default in the performance or payments required under this Contract, with the exception of the Force Majeure clause of this Agreement, and such default is not cured within forty-five (45) days of receipt of written notice of such default, the party in default shall be entitled to recover its direct damages by such default,

which damages shall not include any claim for loss of profits or consequential damages.

ARTICLE XX
APPLICABLE LAW

20 This Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria and English shall be the official language.

ARTICLE XX
ARBITRATION

21 In the event of any dispute between the parties hereto arising out of this contract, the Buyer and the Seller hereby undertake to use their best endeavors to reach an amicable settlement, failing which it is agreed that the matter shall be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria, 1958, Laws of the Federal Republic of Nigeria (Cap. 13).

ARTICLE XXII
INSURANCE

22 The Seller shall obtain all other insurance required hereunder and furnish evidence of such insurance to the Buyer as its interest may appear. The Seller shall not permit any sub-contract from the Seller until evidence of an insurance required of the sub-contractor has been furnished to the Buyer.
The following insurance coverage shall be provided by the Seller:

A. Workmen's compensation, occupational disease and employer's *liability*.

Evidence of adequate insurance coverage under a policy complying with the laws of Nigeria Covering Workmen's compensation.

B. *Automobile Liability*
Evidence of insurance coverage complying with the limits of liability required by Nigerian Law. Such policy shall be purchased in a company allowed to carry on insurance business in Nigeria.

C. *Comprehensive General Liability*
Minimum liability limits of $1,000,000 (One Million Dollars) each single limit, each concurrence for Bodily injury and Property Damage combined.

ARTICLE XXIII
SUB-CONTRACTING

23.1 The Seller shall be entitled to sub-contract the clearance of the equipments from the Nigeria Ports and the insurance of same from USA ports to site, and transportation of all items to the site to its local representative Ben-Reubens (Nig) Ltd., 8/10 TOMOLOJU ESTATE, OGBA, P.M.B. 21562, IKEJA, LAGOS, but shall nevertheless bear full responsibility and other obligations for the proper implementation of the said part of the Agreement.

23.2 The Seller may sub-contract part of any WORK undertaken in this Agreement to one or more responsible sub-contractors of the Seller's choice, provided the seller shall provide the Buyer with a list of all approved sub-contractors. A list of the nature of the WORK to be to be performed by the said sub-contractor(s) in each case shall be provided by the Seller to the Buyer in advance of any performance or work by such sub-contractor. Nothing herein

contained shall in any manner limit the responsibility of the seller for the acts of any sub-contractor notwithstanding any acceptance of sub-contractors by the Buyer.

ARTICLE XXIV
ENTIRE UNDERSTANDING

24. All oral and written negotiations relating to the subject of this Agreement are merged herein, and this Agreement supercedes all prior Agreements, Memoranda, discussions discussions and negotiations with respect to such subject matter.

ARTICLE XXV
NOTICES

25.1 Any notice required to be given or otherwise desired to be given by one party hereto to the other party hereto, shall be effective if given, in writing, by telegram or by mail, postage prepaid, in the case of notice to the Buyer's address:

The Permanent Secretary,
Ministry of Defense,
P.M.B. 12590,
Lagos,
Nigeria.
(Nigerian Airforce Aeromedical Centre)

25.2 And in the case of the Seller addressed:

W.S. Kirkpatrick & Co. International,
22 Audrey Place,
Fairfield, New Jersey, USA

or to such other address as may be communicated in writing by one part to the other.

25.3 Such notices sent by airmail shall be considered delivered and becomes effective on the fifteenth (15th) day after the date of mailing thereof. Notices by cablegrams or telex shall be considered delivered and becomes effective upon sending thereof.

ARTICLE XXVI
SEVERABILITY

26 Each paragraph and every provision of each part of each paragraph of this Agreement shall be independent of the other, and in the event that any paragraph shall be judged to be illegal or contrary to public order, the said illegality shall not affect the other parts of this Agreement and the provisions of this Agreement shall remain valid, binding and executory.

ARTICLE XXVII
HEADINGS

27 The division of this Agreement into paragraphs and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

ARTICLE XXVIII
DATE OF COMPLETION

28 The date of completion shall be that date upon which the Buyer indicates to the Seller its acceptance of the systems and related equipment and the Buyer certified by certificate of acceptance his acceptance of the systems and equipments after installation.

ARTICLE XXIX
TERMINATION OF CONTRACT

29 Either party shall have the right to terminate this Agreement if the delivery of the goods, for the reasons mentioned in Article Force Majeure, is delayed, or on reasonable grounds can be expected to be delayed for more than twelve (12) months. The costs already incurred by the parties towards the implementation of this Agreement shall then be determined and apportioned through Arbitration, failing amicable settlement. Notice of termination of the Agreement shall be given in writing. If there should be any possibility of selling the items, proceeds from such a sale shall be deducted from the above mentioned costs.

ARTICLE XXX
COUNTERPARTS

30. This Agreement may be executed in one or more counterparts, each of which will constitute valid and binding obligations upon the parties hereto.

ARTICLE XXXI
ENTRY INTO FORCE

31. This Agreement shall become effective on the date of signature by both parties.

IN WITNESS WHEREOF the parties hereto have hereunder affixed their hands and seals the day and year first above written:

SIGNED SEALED AND DELIVERED

by the said Alhaji Akanbi Oniyangi Minister of Defence, Ministry of Defence, Lagos for an on behalf of the Government of the Federal Republic of Nigeria.

In the Presence of:

SIGNED SEALED AND DELIVERED

By the said HARRY CARPENTER for and on behalf of W.S. Kirkpatrick & Co. Inc.

In the presence of:

Systems Material	*Base Price FOB FACTORY*	*Spares FOB FACTORY*	*Total Price FOB FACTORY*
Hyperbaric Chamber System	$3,252,946	$299,214	$3,552,160
Hypotaric (Altitude) Chamber	2,746,710	252,578	2,999,288
Environmental Monitering Enclosure Equipment	143,223	13,193	156,416
Helmet Storage, Repair and Cleaning Room Items	8,177	753	8,930
Night Vision Illusion Trainers	51,342	4,730	56,072
Pressure Breathing Trainer Consoles	18,316	1,687	20,003
Oxygen Denitrogenation Consoles	11,647	1,073	12,720
Parachute Landing Fall Trainer	89,851	8,277	98,128
Parasail Training Equipment	76,251	7,025	83,276

Systems Material (Cont.)	*Base Price FOB FACTORY*	*Spares FOB FACTORY*	*Total Price FOB FACTORY*
Model 2015-SP Human Centrifuge	1,653,648	151,420	1,805,068
Model 2200 Vertifuge II	511,261	47,099	558,360
Somatagyral Servo Turntable	71,446	6,582	78,028
Ejection Seat Trainer	233,028	21,408	254,436
MATERIALS TOTALS FOB FACTORY	$,8,867,846	$815,039	$9,682,885

TECHNICAL SERVICES	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
Installation, Assembly and Test	$219,375	$65,812.50	$153,562.50
Training - See Schedule B & D 167,573 to be paid in U.S. Dollars 100,547 U.S. Dollars to be paid in Naira			
Maintenance Services - one year See Schedule B and E	$ 146,250	$ 43,875	$102,375

TECHNICAL SERVICES (Cont.)	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
PLUS: Crating, Inland Delivery from factories to port, insurance from factories to port, and ocean freight and forwarding charges from USA to Lagos, Nigeria. These are test estimated prices, but payament will be made against actual invoices		298,365	
Insurance Ports handling charges, Transportation to site Following charges to be paid in Nigeria in Naira to firm of Ben-Reubens (Nig.) Ltd.			

TECHNICAL SERVICES (Cont.)	*Total Amount*	*Amount Payable Offshore*	*Amount Payable In Naira*
l) Unloading charges, clearing and motor transport to Kaduna		70,330	70,330
2) Insurance f rom port to USA to site in Kaduna (NICON's Estimate)	149,718.75		149,718.75
TOTAL VALUE OF CONTRACT	$10,835,048.75		
$10,258,515.50 to be paid in U.S. Dollars			
U.S. Dollars to be paid in Naira	576,533.25		

SUMMARY
Details of Service Charges

(i)	Installation, Assembly and Test	$	219,375.00
(ii)	Training (a) Payable in U. S . Dollars	$	67,578.00
	(b) Payable in Naira equivalent	US $	100,547.00
(iii)	Maintenance Services	$	146,250.00
(iv)	Crating and Inland	$	298,365.00
(v)	Unloading Charges etc .	$	70,330.00
(vi)	Insurance (Payable in Naira Equivalent	$	149,718.75
	Total	$	1,152,163.75
FOB cost of Equipment and Spare Parts		$	9,682,885.00
			$10,835,048.75

In Words (Ten Million, Eight Hundred and Thirty Five Thousand Forty Eight Dollars, Seventy Five Cents).

1.	Value of Contract payable in U.S. Dollars	$10,258,515.50
2.	Value of Contract payable in Naira Equiv.	$ 576,533.25
	Total Value of Contract	$10,835,048.75

APPENDIX IB

ARTICLES OF AGREEMENT	*PAYMENT IN FOREIGN CURRENCY BY IRREVOCABLE LETTER 0F CREDIT SCHEDULE OF PAYMENT*
3.3 (i)	US $2,904,865.50
3.3 (ii)	US $1,452,432.75
3.3 (iii)	US $1,936,577.00
3.3 (iv)	US $ 968,288.50
3.3 (v)	US $ 484,144.25
3.3 (vi)	US $ 131,062.50
3.3 (vii)	US $ 33,515.50
3.3 (viii)	US $ 298,365.00
3.3 (ix)	US $ 65,812.50
3 3 (x)	US $ 43,875.00
	$8,321,939.50

APPENDIX IC

PAYMENT IN NAIRA SCHEDULE OF PAYMENT

ARTICLES		
4 1	Naira Equivalent	US $ 50,273.50
4 ii		$ 50,273.50
4 iii		$ 43,875.00
4 iv		$ 109,687.50
4 v		$ 102,375.00
4 vi		$ 149,718.75
4 vii		$ 370,330.00
	TOTAL	$ 576,533.25

APPENDIX 2
MAINTENANCE SERVICE

I. *GENERAL*

To ensure continued and efficient operation of the deliverable systems following Buyer's acceptance, a maintenance technician shall remain on-site for a period of twelve (12) months.

A. *Duties and Responsibilities*

The on-site technician shall perform as a technical advisor to the Buyer. His primary duty and responsibility shall be to advise and assist the Buyer in matters of system performance where safety and maintenance are involved. Under the administration control and authority of the Buyer he shall:

1. be responsible to assist in the implementation and continued execution of the preventative maintenance programme.

2. be responsible to notify the Buyer of any unsafe or hazardous condition encountered, including but not limited to:

   a. operational procedures

   b. the introduction of potentially toxic substances pressure vessels

   c. erratic equipment operation suggesting the necessity for corrective action.

3. be responsible to assist in the execution of an on-going maintenance training program for buyer's personnel

4. be responsible to advise the buyer regarding areas of possible improvement such as:

   a. operational procedures

   b. safety procedures

   c. maintenance procedures

B. *Reporting*
The on-site maintenance technician works under the administrative control and authority of the Buyer. Nevertheless, he remains the seller's employee and retains his responsibility to it as its employer. In this regard he shall:

1. Submit a weekly activity report

2. Submit copies of all memoranda or other written data submitted to the buyer as occurring

3. take no action, make no commitments and enter into no agreements with the buyer which are beyond the scope of his authority.

C. *Conditions of Service*
The following conditions of service shall apply:

1. The on-site maintenance representative is expected to remain in the country for one (1) year period of time. However, illness, an emergency or other conditions may require a shorter presence. In this event, the seller shall ensure his replacement is fully capable of relief and shall if possible, ensure an

acceptable dual presence period for continuity purposes.

2. The on-site maintenance technician is under contract to provide an advisory and assistance service. He is not authorized to make unilateral decisions on behalf of the buyer nor accept liability for actions outside the normal scope of his defined activity.

3. The buyer must recognize and accept that on-site maintenance activities shall require the services of more than one individual. In this regard it shall be his responsibility to provide for additional personnel as may be required. Alternatively, and if desired, the seller shall provide for complete on-site maintenance services under mutually agreed contract.

4. The buyer shall be responsible for arranging visa, clearance for the maintenance and technical personnels with His Excellency, Consulate General of Nigeria.

General

Installation assembly and test of the systems delivered is one of the more important aspects of the contractual activity; however, at this time one of the least well defined. We are totally confident that all deliverable items are properly configured to interface with the Aeromedical Centre building but recognise the requirement for firm and detailed interface between ourselves and the building contractor to plan all installation, assembly and test requirements for a smooth and orderly flow of events.

In addition to sequential planning in this regard, each party needs to be totally aware of where their responsibilities begin

and end. During the building construction phase there shall undoubtedly be actions which can be accomplished to facilitate case of installation of the equipment. Likewise, we must be sensitive to the building schedule to ensure deliverables may be landed into their respective foundation sites and not impede construction activity.

Throughout these specifications great care has been paid to define the deliverables and the responsibilities. However, the systems to be delivered are complex and final design actions shall undoubtedly raise additional questions. We are confident that by establishing an attitude of mutual respect and co-operation the installation, assembly and test phase can be accomplished in an effective trouble free manner.

A. *Personnel*

The various equipment manufacturers providing equipment under the terms of this contract shall furnish the necessary personnel in country to effect the installation assembly and test activities.

B. *Materials*

We have not included installation materials as a portion of the fixed price quotation. To do so at this time is not possible. Material requirements shall be defined as the programme unfolds and at such times as the building contractor provides building drawings and utility stubs and detail design drawings are completed. For Budgetary purposes, we would suggest the building contractor include the sum of $150,000 (one hundred and fifty thousand U.S. dollars) in their figures for such materiais. Where feasible and advantageous, we can provide defined materials when fully identified.

C. *Assistance*

Referred to elsewhere in these specification

D. *Test Procedure*

In accordance with the test schedule to be prepared, the seller shall present for test all systems specified in this document. The acceptance test shall be conducted within 24 hours (twenty four hours) of presentation of readiness and all systems and their components shall be tested to meet represented specification. Upon satisfactory completion of said test the buyers representative shall certify his acceptance of all systems. Should exceptions to satisfactory test performance be noted, it shall be the manufacturer's responsibility to rectify the problem and again present for acceptance that system, sub-system or component previously found to be unsatisfactory.

SCHEDULE EVENTS

Installation, assembly and test activity is a continous evolution whereby deliverable systems are interfaced into a facility and thence prepared for full operation. The schedule of events are generally as follows and percentile of overall time and cost factors as presented.

A. *INSTALLATION*

Phase One

The Aeromedical Laboratory contractor selected by the Buyer shall be responsible to physically prepare the building for acceptance of all contracted deliverables in accordance with detailed and itemised drawings and instructions provided by the seller. In this regard, he shall provide all foundations; anchor bolts, levelling plates - electrical motor startors, circuit breakers, junction boxes, conduits and stuffing glands - piping and valves and water and

electrical connection points not an integral portion of the constructed deliverable systems.

Phase Two
The buyer shall be responsible for the provision of labour and equipment for unloading, unpacking, erection and installation of deliverable equipment into his designated and prepared building location. During this phase, the seller's installation Supervisor shall be provided to directly supervise inspect and verify activity safety and accuracy and document any damages which may have occurred during shipment or handling.

Phase Three
The seller shall be responsible to secure all deliverable equipment to its prepared building attachment points (foundation anchor points, levelling plates and connection points).

B. *Assembly*
During assembly activity the installation, assembly and test team shall physically interconnect all equipment deliverables as applicable. In part, such activity shall consist of such items as:

1. interconnect and assemble hypobaric system vacuum piping and manifolds,

2. interconnect and assemble hypobaric system air compressor-systems,

3. interconnect and assemble hypobaric system control consoles,

4. interconnect centrifuge to its parent control console

5. etc -

Note: The assembly activity is that evolution whereby all equipment deliverable are brought together to perform their design task.

C. *Test*

Phase one - during test operations all systems are thoroughly checked out by such action as:

1. circuit electrical continuity tests

2. piping flow tests

3. vacuum system leat tests

4. fire supression system deluge activation and flow test

5. vertifuge and centrifuge rotation and stability tests

6. analog and digital measurement accuracy tests

7. training device operational performance test

8. integrated system performance tests

Phase two - present all systems (individually) for acceptance test by the Nigerian Air Force designated representative.

EMRO ENGINEERING COMPANY, Inc.

POST OFFICE BOX 536 • SUMMIT, NEW JERSEY 07901 U.S.A •
201-772-5003

December 10, 1981

Headquarters, Nigerian Air Force
Ministry of Defense
Lagos, NIGERIA

Attn: Gp. Cpt. Isaac A. Odeh
Director of Medical Services

Gentlemen:

It is our understanding that William Mitchell, President of Environmental Tectonics Corp. (ETC), Southampton, Pennsylvania, U.S.A., has recently visited your goodselves, and possibly other NAF personnel, and has alleged that the Emro products currently under consideration for procurement by NAF (i.e. Emro Model 2200 Vertifuge, Emro 2015-SP Centrifuge, and Somatogyral Turntable) are the products of ETC!

If our understanding is correct, and Mitchell has indeed made such representations, then we must inform you that he is categorically lying to you and is attempting to interfere with and disrupt our business in a highly fraudulent manner. We would hope that our information is wrong. However, there is some possible validity in the matter because Emro terminated ETC as its sales representative in November 1980, when we discovered ETC to be misrepresenting itself as designer and manufacturer of Emro products in addition to other dishonest conduct. They have continued to do so and we therefore have instituted legal proceedings to restrain ETC from continuing such fraud.

As you are aware, the good firm of W.S. Kirkpatrick & Co., Int'l. are now our authorized sales representative in Nigeria.

Please let me assure you that the Emro products named above were originated, designed, and are produced by and for Emro exclusively. They are proprietary products of Emro.

ETC has never designed or built a human centrifuge nor have they ever built a disorientation trainer. And, they can no longer offer or sell Emro products.

You may be interested to know that we have just completed and shipped a VERTIFUGE to the Republic of Singapore Air Force, and we are presently completing an Emro 2015-SP Human Centrifuge for the Canadian Armed Forces. In addition to the VERTIFUGE we also supplied a Somatogyral Turntable to the Singapore Air Force.

I do hope the above will serve to clarify and correct any falsification of the truth.

Sincerely,

Robert W. Ruppert, P.E.
President

RWR:mg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK, INC., *et al.*	)	

CERTIFICATE OF SERVICE

ALAN TURNER, ESQUIRE, hereby certifies that a copy of the within Amended Complaint was served upon the following persons by placing a copy of same in the United States Mail, postage prepaid, on Friday, July 11, 1986:

Thomas H. Sear, Esquire
Rhonda D. Orin, Esquire
Spengler, Carlson, Gubar, Brodsky & Frischling
280 Park Avenue
New York, New York 10017

Lawrence S. Horn, Esquire
Sills, Beck, Cummis, Zuckerman,Radin, Tischman & Epstein
33 Washington Street
Newark, New Jersey 07102-3197

Theodore V. Wells, Jr., Esquire
Kelley Newton, Esquire
Lowenstein, Sandler, Brochin, Kohl,
Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, New Jersey 07068

RUTTER, TURNER & STEIN

By _____
Alan Turner

LAW OFFICES

RUTTER, TURNER & STEIN
209 HADDON AVENUE
HADDONFIELD, NEW JERSEY 08033

(609) 429-6022

ALAN A. TURNER
NEW JERSEY RESPONSIBLE ATTORNEY

July 25, 1986

Mr. James Placke
Paul, Hastings, Janofsky & Walker
Twelfth Floor
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5331

TRANSMITTED VIA TELECOPIER

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., *et al.*

Dear Mr. Placke:

We represent Environmental Tectonics Corporation, International ("ETC") in connection with a civil lawsuit for damages stemming from ETC's failure to be awarded an aeromedical supplies and construction contract with the Republic of Nigeria in 1982. The contract was awarded to W.S. Kirkpatrick on March 19, 1982 and, we understand, was partially, but not completely performed by Kirkpatrick thereafter, even though the Republic of Nigeria appears to have paid $8,800,000 to Kirkpatrick.

The basis for ETC's suit is that Kirkpatrick and its then Chief Executive Officer Carpenter agreed to bribe certain Nigerian officials through the agency of one Benson "Tunde" Akindele, a Nigerian national who resides in London. Both

Kirkpatrick and Carpenter have been prosecuted by the United States government in criminal proceedings occurring in the District of New Jersey. Both Kirkpatrick and Carpenter pled guilty and have now been sentenced for violations of the Foreign Corrupt Practices Act. Enclosed is a copy of a document entitled "Offer of Proof" which was signed by Kirkpatrick's lawyer and was filed with the United States District Court in connection with the criminal proceeding against Kirkpatrick. This Offer of Proof sets forth a summary of the facts as then known to the United States prosecutors.

Kirkpatrick has raised the Act of State Doctrine as a defense to this civil action. Under the Act of State Doctrine, a United States Court is sometimes precluded from inquiring into the actions of a foreign sovereign where such inquiry might have an impact upon the relationship between the United States and that foreign sovereign. The Act of State Doctrine was judicially created so that a United States Court would not act on a matter more properly allocated to the Executive Branch of the United States and has been applied in instances where the foreign government is not a party to the civil action.

Although we believe the Act of State Doctrine not to have proper application to the facts of this case, we also believe, should the Republic of Nigeria state that it has no objection to this private litigation in the United States between these two American companies, the Court would certainly then not prevent this suit from going forward. If the Republic of Nigeria would indicate that ETC's prosecution of this lawsuit would not have any impact whatsoever upon the relationship between the United States and the Republic of Nigeria, the act of state claim could be finally laid to rest.

We would very much appreciate your assistance in securing an appointment with the appropriate Nigerian officials, either at the Embassy in Washington, D.C., or in Lagos, Nigeria, with whom to discuss this problem and, we hope, secure the assistance of the Nigerian government mentioned above.

With thanks in advance for your cooperation.

Sincerely,

RUTTER, TURNER & STEIN

By s/s Thomas B. Rutter
Thomas B. Rutter

TBR: kad

Enclosure

A-124

LAW OFFICES

RUTTER, TURNER & STEIN
872 PUBLIC LEDGER BUILDING
INDEPENDENCE SQUARE
PHILADELPHIA, PENNSYLVANIA 19106

(215) 925-9200
TELECOPIER (215) 925-1553

July 31, 1986

H.E. Ambassador Ignatius C. Olisemeka
Embassy of Nigeria
2201 M Street, N.W.
Washington, D.C. 20037

Your Excellency:

At the suggestion of Minister-Counselor Simeon A. Adekanye, whom I had the pleasure of meeting at the Embassy this morning, I submit herewith a brief chronology relating to a certain contract between the Republic of Nigeria and W.S. Kirkpatrick & Co., Inc. and its parent corporations.

I submit this chronology, and had the pleasure of the visit with your Minister-Counselor, so as to request a declaration, in such form as your government may see fit, that the Republic of Nigeria has no objection to the continued prosecution of a civil lawsuit presently pending in the United States District Court for the District of New Jersey wherein my client, Environmental Tectonics Corporation, has brought suit against Kirkpatrick on the ground, principally, that Kirkpatrick obtained the contract mentioned in the preceding paragraph by the payment of $1,764,019.58 (more or less), directly or indirectly, to officials of the Republic of Nigeria in 1982/1983, which acts were admitted by Kirkpatrick and its then President,

Harry Carpenter, to have been a violation of the American Foreign Corrupt Practices Act in the course of criminal proceedings against them in the United States District Court for the District of New Jersey.

The purpose of the lawsuit instituted by my client is to recover the profits it lost by virtue of being deprived of the opportunity to supply to Nigeria the facilities and services encompassed by the contract wrongfully obtained by Kirkpatrick. We have taken the position at all times — that not only was our client victimized by the acts of Kirkpatrick but, also, the Republic of Nigeria and its people were likewise victimized.

Accordingly, we request a declaration from the Republic of Nigeria both to the effect mentioned above and to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America. The purpose of such declaration would be to nullify the Kirkpatrick companies' argument in our Federal Court matter that the Court should not hear this case, or discover the facts pertaining to Kirkpatrick's activities, since to do so would involve an allegedly improper inquiry into the official acts of the Republic of Nigeria. (This defense goes under the rubric of the "act of state" doctrine in American law.)

As I told your Minister-Counselor, I should be pleased to supply such additional detail concerning this matter as is permitted in view of the fact that Kirkpatrick has caused a cloak of confidentiality to be placed over all of its acts in the Federal Court. For example, both I and appropriate representatives of my client would be pleased to meet with you or such person as may be designated for the purpose of a further review of the facts whether such meeting should be scheduled in the United States or in the Republic of Nigeria.

In any event, I thank you for the attention you have given this matter and, more particularly, I am grateful for the

courtesies extended to me by Mr. Adekanye and his associate during our meeting today.

Respectfully,

RUTTER, TURNER & STEIN

BY s/s Thomas B. Rutter
Thomas B. Rutter

TBR: rmd
Enclosure

RUTTER, TURNER & STEIN

CHRONOLOGY

On or about February 2, 1981, it was disclosed that the Air Force of the Republic of Nigeria was contemplating the purchase of physiological training equipment for use at the Aero Medical Center at Kaduna Air Force Base.

On or about February 13, 1981, Environmental Tectonics Corporation submitted *pro forma* pricing information to its agent, British Films Limited, for transmittal to Nigeria.

At or before that same time, Harry G. Carpenter, then President of W.K. Kirkpatrick, held meetings with Benson H. "Tunde" Akindele and Alhaji A. Ringam in which, according to Mr. Carpenter's memorandum of March 30, 1981 the following occurred:

> "At the first meeting with Benson Akindele, we spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.
>
> "We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 (actually Ross and I had worked up an FAS packed for export quotation from all three manufacturers of $6,543,655, and then had added a 15% margin for Kirkpatrick of $981,548, which comes to $7,525,203. Please bear in mind that the Kirkpatrick

margin should be increased by an additional $154,347, which was the 3% included by NEI as described above). We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project 'over the top'.

"We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.

"Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele had called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna.

"At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

"Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously, he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th at 9 P.M. to talk it over."

In May 1981, two Panamanian corporations named, respectively, Dereks and Los were established whereby, pursuant to written agreements, Kirkpatrick agreed to pay to them a commission equal to twenty percent (20%) of the price agreed to be paid by Nigeria for the aero medical equipment. These corporations were set up and controlled by Akindele for the sole purpose of receiving these payments and making distributions of the sums thereby received.

In July 1981, Environmental Tectonics Corporation wrote to the Armed Forces Attache of the Embassy of Nigeria in Washington (Attention Air Commodore L. O. Uwayzor) whereby Environmental Tectonics Corporation sought the opportunity to fulfill the Nigerian contract needs.

In September 1981, the President of Environmental Tectonics Corporation, Mr. William F. Mitchell, attended the International Congress on Aviation Medicine at Nancy, France and, while there, discussed the Nigerian aero medical needs with various persons attending that conference from Nigeria

including, particularly, Dr. M.A. Owolabi who was then the Flight Surgeon for the Nigerian Air Force. At that same time, Mr. Mitchell came to learn that a certain Dr. Plumptre, Wing Commander for Medical Services at Ikeja, Nigeria had some connection with Kirkpatrick and desired to keep Environmental Tectonics Corporation from being involved in the bidding process.

In December 1981, Mr. Mitchell travelled to Lagos for the purpose of getting further details on the Nigerian aero medical needs and for the purpose of providing further information as to the capabilities of Environmental Tectonics Corporation. While there he met Dr. I.A. Odeh and was joined at that meeting by Dr. Plumptre. During the course of those meetings the Nigerian officials seemed to learn for the first time that Kirkpatrick was not a manufacturer of the aero medical equipment (but was merely a broker for such equipment) whereas Environmental Tectonics Corporation had been a manufacturer for almost twelve (12) years and a supplier of such equipment to the United States Air Force and to the United States Navy as well as to various foreign air forces.

Between December 1981 and February 1982, Environmental Tectonics Corporation prepared bids on each of the components of the aero-medical needs of the Nigerian Air Force for the purpose of submission to the appropriate Nigerian officials.

In February 1982, Mr. Mitchell returned to Lagos for the purpose of presenting Environmental Tectonics Corporation's bids.

In March 1982 (and continuing, apparently, into April 1982) Carpenter (on behalf of Kirkpatrick) had further meetings with Akindele and Ringim whereby the division of the twenty percent (20%) add-on was agreed upon and the price to the Republic of Nigeria for the aero medical equipment seems finally to have been set at about $11,000,000. $1,900,000 of the price increase was intended for the "mark-up" and $1,700,000 was intended as additional profit for Kirkpatrick.

The division of the twenty percent (20%) was agreed to be made as follows:

2 1/2% - for Akindele
5 % - for Air Force
2 1/2% - for medical group
5 % - for the party
2 1/2% - for the minister himself
2 1/2% - other key defense personnel

(We are not presently able to state whether or, if so, how much of the payments ultimately made to the Panamanian corporations were distributed to the individuals or to members of the groups here identified. We do know that $1,764,019.58 was paid to the Panamanian corporations by Kirkpatrick for the purposes here recited.)

On March 19, 1982, a contract was entered into between the Ministry of Defense and Kirkpatrick for supply of the aero medical equipment for the total purchase price of $10,800,000.

In September 1982, payments totalling $311,587.04 were made by Kirkpatrick to the Panamanian corporations.

In December 1982, payments totalling $589,073.00 were made by Kirkpatrick to the Panamanian corporations.

In February 1983, payments totalling $290,486.54 were made by Kirkpatrick to the Panamanian corporations.

In August 1983, payments totalling $580,973.00 were made by Kirkpatrick to the Panamanian corporations.

The amounts set forth in the preceding four paragraphs constitute, according to Kirkpatrick's admissions in the American courts, twenty percent (20%) of the funds received

from the Republic of Nigeria pursuant to the contract of March 19, 1982.

In April 1983, upon becoming aware that its price for the aero medical equipment was several million dollars less than Kirkpatrick's price to Nigeria for the same equipment, and otherwise coming to believe that improper payments of the sort mentioned above had been made, representatives of Environmental Tectonics Corporation reported the facts as then known to them to Wing Commander Olufemi Akinyosoye and to the United States Embassy in Lagos.

Beginning in March 1984, and continuing through the present time, we are informed that Kirkpatrick has failed to perform the contract although paid in excess of $8,820,000. In that connection, both Dr. Akinyosoye and Dr. M.A. Owolabi appear to be among the individuals who have tried to correct the Kirkpatrick shortcomings and otherwise to rectify the situation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 86-796-HJS

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	:	
	:	TRANSCRIPT OF
Plaintiffs,	:	PROCEEDINGS
-v-	:	August 20, 1986
W.S. KIRKPATRICK, INC., et al.,	:	
Defendants.	:	
	:	Newark, New Jersey

BEFORE:

HONORABLE ALFRED J. LECHNER, JR.
UNITED STATES DISTRICT COURET JUDGE

Appearances:

RUTTER, TURNER & STEIN
BY: THOMAS B. RUTTER, ESQ.
For the Plaintiff.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ.
and
RHONDA D. ORIN, ESQ.
For the Defendant Kirkpatrick & DIC Holding

LOWENSTEIN, SANDLER, BROCHIN, KOHL, FISHER, BOYLAN & MEANOR
BY: KELLY NEWTON, ESQ.
For Defendant Carpenter.

SILLS, BECK, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN & EPSTEIN
BY: ROBERT J. ALTER, ESQ.
For Defendant Chu

JOANNE M. HOUSTON, C.S.R.
Official Court Reporter - United States District Court
P.O. Box 397
Newark, N.J. 07101
(201) 352-2586
(201) 645-2260

August 20, 1986

THE COURT: We have a Court Reporter here. Could you each identify yourself for the record with regard to your respective clients?

Mr. Sear, you start. I can't hear you.

MR. RUTTER: Tom Rutter on behalf of the plaintiff.

MR SEAR: Thomas Sear and Rhonda Orin on behalf of the defendants, W. S. Kirkpatrick and Development Industrial Corporation DIC (Holding) Inc.

MR ALTER: Robert J. Alter. I am covering for a partner in the firm, Lawrence S. Horn, an observer unfortunately more than anything else, because I don't know that much about the case. I believe we represent the defendant Chu.

THE COURT: All right.

Anybody else on the line? I have Mr. Rutter, Mr. Sear and the associate from your office.

MR. SEAR: Rhonda Orin.

MS. NEWTON: Kelly Newton from Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan and Meanor on behalf of Harry Carpenter.

THE COURT: The reason I asked for this conference call is we have a motion for Monday. I'm only going to address the motion to dismiss, one 12(b)6 motion, not the Fifth Amendment motion that's on appeal from the Magistrate.

I have a number of questions and I don't need responses right now to any of these, but after I give you these questions perhaps without;t responding we could talk about the posture of the motion. All right.

Can you all hear me?

MR. SEAR: Yes.

MR RUTTER: Yes.

THE COURT: Now, with regard to the Act of State Doctrine, there are a number of allegations in the complaint with regard to the bidding practices between Nigerian Government and I guess it would be Kirkpatrick and by implication the other defendants. I think I understand the complaint to say that before the final bid went in, the formal bid, it was increased by 20 percent to cover the bribes.

Mr. Rutter, am I correct on that? Mr. Rutter, I can't hear you.

MR. RUTTER: You correctly understand.

THE COURT: Thank you. I can barely hear you. There is a bad connection.

The questions that I have, in light of this, are: is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

Did Nigeria compell the payment of the bribe under penalty or loss of the contract?

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants in this case?

In paragraph 35 of the amended complaint, you talk about several people who have received payments. They include: "The medical group", "The partys", "The minister himself" and other key defense personnel. Who are the medical group, the party and the minister?

I would appreciate a clean copy of the contract that is completely readable. I can't read the copy that I have which is attached to the complaint.

Has the contract been completed?

Have all obligations been performed under the contract?

Have the goods and supplies been delivered?

Has the base been constructed?

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

Who initiated the concept of the bribe, the defendants or the Nigerians?

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when?

Has the Nigerian Government challenged in any way the contract or the parties to the contract?

One other point concerning the RICO aspect. In the amended complaint -- I believe it's paragraph 57, there is an allegation or "other improper acts" that, I believe, are

suggested to be similar to the Nigerian situation. As I recall, and I don't have the complaint in front of me, there are no facts: these are conclusory statements. Is this type of a pleading legally sufficient under the Rico setting?

Now, I ask these questions in connection with the motion that is pending in front of me. Since I've asked these questions, it seems to me I'll have to handle one question under a Rule 56, summary judgment treatment since I'll be asking for information other than that contained in the pleadings. I would appreciate receiving this information, if it's at all available, it will help me rule on the motion.

Now, if anybody has any comments on my request, I'll hear you in turn. Does anybody wish to be heard on this?

MR. RUTTER: This is Tom Rutter for the plaintiff.

I believe I understand your questions. I have no objection to answering them, to the extent that the information is available to us on the plaintiff's side.

THE COURT: I appreciate that. Thank you.

MR. RUTTER: I would also ask, however, that any answer that is given to you by the defendant be given to the plaintiff, since they have the knowledge and give it to us and the answer as to whether the contract has been performed and if there is any civil or criminal action by the Nigerians against anybody, to supply us.

THE COURT: Absolutely. What I suggest is as follows: you all submit this information to me together and then if you feel there is necessity to respond to an adversary's submission, I'll allow you to do so. I would like to receive this all one bulk submission, with the opportunity to respond. I appreciate the fact that some of the information may be difficult to obtain or it may take a little time.

I need the information to rule on the application that's in front of me. I was assigned this case in mid or late July. That's the status of where I am in the case.

MR. RUTTER: Perhaps it's how promptly we'll be able to make a joint submission on the fact.

THE COURT: Mr. Sear, any input on that?

MR. SEAR: Yes. In terms of the questions that we're going to be able to answer, my immediate reaction is that we'll be able to answer them very, very quickly. There are a number of questions, without getting into the merits of our motion to dismiss and so forth, but there are a number of questions as to which we have no knowledge and would be looking to the plaintiff for whatever information or evidence or facts they have.

THE COURT: Well, if I can suggest that perhaps you people pool your resources on this and see what you can develop. If we fall short on answering some of these questions, maybe we can explore a little bit further to see what we can do to answer them. Maybe by answering some, it won't be necessary to answer all. I don't know, I don't have enough information. That's why I pose this.

MR SEAR: Your Honor, you have a notion as to how this fits in with the scheduled oral argument on Monday at 11?

THE COURT: Well, my point is I don't think that we should go ahead with the oral argument, because I'm asking these questions. I am asking the questions so I will feel more comfortable in responding to the issues that were brought up. I am a bit ill at ease in applying the arguments to the limited facts that I have and by getting this information I will have more of a foundation to look at what is being presented. I will look at it on a summary judgment basis in light of the request by me.

MR RUTTER: On behalf of the plaintiff, we understand your concern. I'm going to --

THE COURT: We have a very bad connection with Mr. Rutter, everyone else is coming in clear.

You proposed to speak with Mr. Sear by telephone and then I assume get back to me?

MR. RUTTER: I would like to speak with Mr. Sear so he and I can come, and other counsel, of course, get some understanding as to a timetable when we can make the joint submission to you and advise you of that so that you can schedule the matter accordingly, if that's agreeable to you.

THE COURT: Anybody have a problem with that?

MR. SEAR: No, your Honor. As a matter of fact, we're very desirous of having the motions ruled on, but we're even more desirous of having everything before your Honor that you need to have before you to make the proper ruling. So what I would suggest is that Mr. Rutter and myself try to maybe get together by phone tomorrow, after we've had a chance to review these questions and then communicate with your chambers as soon as we have a notion of when the information could be provided by both of us.

THE COURT: That would be fine with me. I want you to understand that I want to give you the time that's necessary, but I don't want to drag it on indefinitely, so.

MR. SEAR: From our end, it won't drag on because we're very much interested in getting the quickest hearing on these motions. We're going to jump through hoops to get all the information we can get, get in a very expeditious way.

MR. RUTTER: Can I suggest that we speak by telephone at noon tomorrow on the timetable?

MR. SEAR: Sounds good to me.

MR. RUTTER: I'll place the call.

MR. SEAR: Okay. Judge, if I might, could I ask who's -- if I can figure our a way of ordering a transcript? We've tried to take pretty good notes. If I can get a transcript of the questions, make arrangements to get them, that also will facilitate.

THE COURT: The court report is Joanne Houston. She is acknowledging right now that you're making the request. I'll have it sent to your firm in New York.

MR. SEAR: That would be great. Maybe if Miss Houston has a phone number we can talk with her directly about this.

MR. RUTTER: I likewise request that the court reporter send me them by Federal Express at my expense, a copy of the transcript.

THE COURT: All right. We'll have that done.

MR. ALTER: I join. I'd like a transcript.

THE COURT: Okay. Miss Newton?

MS. NEWTON: We'll make it unanimous.

THE COURT: All right.

MR. SEAR: It's easy to be unanimous.

THE COURT: I hope we have this agreement throughout the remainder of the case.

Is there anything else?

MR. RUTTER: No.

MR. SEAR: I take it, though, Judge, for planning purposes, to be realistic about it I don't think we'll make a Monday argument.

THE COURT: I don't think you'll make it either.

MR. SEAR: Okay. Very good. We'll get cracking on this right away.

THE COURT: When you are able to marshall all of the responses that you can, if we have to have an argument on a date other than a normally scheduled motion date, I'll be happy to accommodate all of you along those lines.

MR. RUTTER: Thank you.

MR. SEAR: Thanks very much, Judge.

THE COURT: Okay. Thank you for your time.

(Matter concluded.)

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August 26, 1986

Honorable Alfred J. Lechner
United States District Court
for the District of New Jersey
United States Courthouse
and Post Office Building
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., Inc., *et al.*
Civil Action No. 86-796 AJL

Dear Judge Lechner:

Pursuant to our telephone conference call of August 20, 1986, Plaintiff's responses to your questions are as follows:

1. Is there any law in Nigeria as to bribery of public officials with respect to public contracts?

ANSWER: YES. Submitted herewith, marked Exhibit "A", are copies of the applicable Nigerian statutes as disclosed by our research.

2. Did Nigeria compel the payment of the bribe as a condition of contracting?

ANSWER: No.

3. Has Nigeria been informed of the bribe? How, when, by whom?

ANSWER: Yes. Nigeria was informed not later than the end of November 1985 as a result of publicity surrounding the admissions of guilt and sentences with respect thereto on behalf of Kirkpatrick and Carpenter in the United States District Court for the District of New Jersey. See paragraph 2 in the affidavit of Defendant Carpenter included in the Memorandum of Defendant Harry G. Carpenter In Opposition to Plaintiff's Appeal of Mr. Carpenter's Assertion of the Fifth Amendment Privilege Against Self-Incrimination.

In addition, counsel for Plaintiff in the instant matter has approached the Embassy of the Republic of Nigeria. As a part of that approach, a disclosure as to that matter has been made. Enclosed herewith as Exhibit "B" is a letter of July 31, 1986 to H.E. Ambassador Ignatius C. Olisemeka.

4. Has Nigeria sought redress against any official or any other person?

ANSWER: No.

5. With respect to Paragraph 35 of the Complaint, who are "the medical group", the minister, *etc.*?

ANSWER: Presently unknown to Plaintiff.

6. Has the contract been completed, *i.e.*, has it been performed by the supplying of the equipment and the building of the facility?

ANSWER: No.

7. Are there any international standards as to bribery or the payment of bribes in circumstances like this?

ANSWER: Yes, as reflected in the American Foreign Corrupt Practices Act, violation of which has been admitted to by Defendants Kirkpatrick and Carpenter.

8. Who initiated the concept of the bribe, *i.e.*, the Defendants or Nigerians?

ANSWER: Although Plaintiff has no direct knowledge at present on this question, Plaintiff is informed, and therefore believes, that the concept of the bribe was initiated by Defendant Carpenter and/or others on behalf of the corporate Defendants.

9. Has Nigeria done anything in light of these allegations, *i.e.*, have they challenged the contract or any of the parties thereto?

ANSWER: Not yet.

10. In paragraph 57, we make an allegation as to "other improper acts". Is this conclusionary statement, unsupported by any facts, sufficient for pleading purposes in the RICO setting?

ANSWER: The Court's reference to "other improper acts" refers, we assume, to the following language in paragraph 57: "...had previously engaged in one or more racketeering activities...". This language, whether measured by the standards of Rule 9 as pertains to fraud or by the standards of Rule 8 as pertains to the general Rules of federal pleading, is in our opinion sufficient. See, for example, the cases collected at 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1215 (1969); *Seville Industrial Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984); and, *Kredietbank, N.W. v. Joyce Morris, Inc., et al.*, Civil Action No. 84-1903, Slip Opinion (D.C.N.J. January 9, 1986).

Respectfully submitted,

RUTTER, TURNER & STEIN

By _____
Thomas B. Rutter

TBR: rmd

cc: Thomas H. Sear, Esquire

A-146

Decree No. 38

[22nd November 1975]

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:

PART I

Offences Involving Corruption

Punishment of corruption.

1. Any person who by himself or by or in conjunction with any other person—

(a) corruptly solicits or receives or agrees to receive for himself or for any other person; or

(b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement or reward for, or otherwise on account of—

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(ii) any member, officer or servant of the government or any public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such government or public body is concerned;

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Punishment of corrupt transaction with agents.

2. If—

(a) any agent corruptly accepts or obtains or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do, any act in relation to the affairs or business of his principal, or for showing favour or disfavour to any person in relation to the affairs or business of his principal; zor

(b) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do any act in relation to the affairs or business of the principal or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal;

he shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Increase of maximum penalty in certain cases.

3. A person convicted of any offence under section 1 or 2 of this Decree shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any department thereof or with any public body or a sub-contract to execute any work comprised in such a contract, be liable to imprisonment for a term of fourteen years or to a fine of ten thousand naira or to both such imprisonment and fine.

Presumption of corruption in certain cases.

4. Where in any proceedings against a person for an offence under section 1 or 2 of this Decree, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.

5.—(1) Where in any proceedings against any agent for any offence under paragraph (a) of section 2 of this Decree, it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that such gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to the affairs or business of his principal, he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he did not in fact so do, show or forbear or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

(2) Where in any proceedings against any person for any offence under paragraph (b) of section 2 of this Decree, it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or reward for doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person having reason to believe or suspect that such agent had the power, right or opportunity so to do, show or forbear and that such act, favour or disfavour was in relation to the affairs or business of the principal, he shall be guilty of an offence under that section

notwithstanding that such agent had no power, right or opportunity or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

Corruptly procuring withdrawal of tenders.

6. A person—

(a) who, with intent to obtain from the Government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for such contract, as an inducement or a reward for his withdrawing such tender; or

(b) who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such a contract,

shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Bribery of member of the Supreme Military Council, the National Council of States or the Executive Council, etc.

7. Any person—

(a) who offers any gratification to a member of the Supreme Military Council, the National Council of States or the Federal Executive Council or a member of the Executive Council of a State as an inducement or reward for such member to do or forbear to do any act in his capacity as such member; or

(b) who, being a member of any of the Councils mentioned in paragraph (c) of this section, solicits or accepts any gratification as an inducement or reward for

his doing or forbearing to do any act in his capacity as such member,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for ten years or to a fine of ten thousand naira or to both such imprisonment and fine.

Bribery of member of public body.

8. Any person—

(a) who offers any gratification to a member of a public body as an inducement or reward for—

(i) such member to vote or abstain from voting at any meeting of such public body in favour or against any measure, resolution or question submitted to such public body; or

(ii) such member to perform or abstain from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

(iii) such member to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(b) who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining, as is referred to in sub-paragraphs (i), (ii) and (iii) of paragraph (a) of this section,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of ten thousand naira or to both such imprisonment and fine.

Penalty to be imposed in addition to other punishment.

9. Where a tribunal convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Decree, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the tribunal shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the tribunal, the value of that gratification and any such penalty shall be recoverable as a fine.

Principal may recover amount of secret gift.

10.—(1) Where any gratification has, in contravention of this Decree, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or aquittal of the defendant in respect of an offence under this Decree shall operate as a bar to proceedings for the recovery of such amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

PART II

Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

Establishment of Bureau.

11.—(1) There is hereby established as a department of the Government of the Federation a Bureau to be known as the Corrupt Practices Investigation Bureau.

(2) The Bureau shall consist of a Director and such number of Assistant Directors and other officers subordinate to the Director and Assistant Directors as the Supreme Military Council may from time to time determine.

(3) The Director and the Assistant Directors shall be appointed by the Supreme Military Council and the other officers of the Bureau shall be appointed by the Public Service Commission of the Federation of the recommendation of the Director.

(4) The officers of the Bureau other than the Director and the Assistant Directors shall be known by such title as the Director may determine and the Director shall issue to every such officer a certificate under his hand which shall be evidence of that officer's appointment under this Decree.

General powers of investigation.

12. Notwithstanding anything to the contrary in any law, the Director and any officer of the Bureau authorised in that behalf by the Director either generally or with respect to any category of matters, if satisfied that there are reasonable grounds for suspecting that an offence under this Decree has been committed by any person, may make an investigation in the matter in such manner or mode as the Director may deem fit.

Director, etc., to have powers of a police officer. Cap 43. Cap 30. Laws of Northern Nigeria 1963.

13. The Director, Assistant Directors and the officers of the Bureau designated by the Director shall by virtue of this section have all the powers of a police officer and, without prejudice to the generality of the foregoing, may exercise in relation to offences under this Decree the same powers as are exercisable by a police officer under the Criminal Procedure Code in respect of offences under the Criminal Code, or as the case may be, the Penal Code.

Director's powers to obtain information. Cap. 42. Cap. 89.

14.—(1) In the course of any investigation or proceedings into or relating to an offence under this Decree by any person in the service of the Government or of any department thereof or of any public body under this Decree the Director may, notwithstanding anything to the contrary in any other law, by written notice—

(a) require any such person to furnish a sworn statement in writing enumerating all moveable or immoveable property belonging to or possessed by such person and by the spouse and children of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;

(b) require any such person to furnish a sworn statement in writing of any money or other property sent out of Nigeria by him or paid or delivered to him or to his account outside Nigeria during such period as may be specified in the notice;

(c) require any other person to furnish a sworn statement in writing enumerating all moveable or immoveable property belonging to or possessed by such person where the Director has reasonable grounds to believe that such information can assist the investigation;

(d) require the person in charge of any department office or establishment of the Government, or the chairman, chief executive, manager or similar officer of any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;

(e) require the manager of any bank to give copies of the accounts of such person or of the spouse or child of such person at the bank.

(2) Every person to whom a notice is sent by the Director under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who wilfully neglects or fails so to comply shall be guilty of an offence under this Decree and shall be liable on conviction or imprisonment for one year or to a fine of one thousand naira or to both.

Powers of search and seizure.

15.—(1) Whenever it appears to the Director upon information and after such enquiry as he thinks necessary that there is reasonable cause to believe that in any place there is any document containing any evidence of the commission of an offence under this Decree or any article or property relating to the commission of an offence under this Decree the Director may, by warrant directed to any officer of the Bureau, empower the officer named herein to enter such place by force if necessary and search for, seize and detain any such document, article or property.

(2) Whenever it appears to any officer of the Bureau other than the Director, that there is reasonable cause to believe that in any place there is concealed or deposited any document containing evidence of the commission of an offence under this Decree and that officer as aforesaid has reasonable grounds for believing that by reason of the delay in obtaining a warrant the object of the search is likely to be frustrated, that officer may exercise in and in respect of such place all the powers mentioned in subsection (1) of this section in as full and ample a manner as if he were empowered to do so by warrant issued under the said subsection.

Director's power to order inspection of bankers' books.

16.—(1) The Director may, if he considers that any evidence of the commission of an offence under this Decree by any person in the service of the Government or of any

department thereof or of a public body is likely to be found in any banker's book relating to such person, his wife or child or to a person reasonably believed by the Director to be a trustee or agent for such person, by order under his hand authorise any officer of the Bureau named in the order to inspect any such book and the person so authorised may, at all reasonable times, enter the bank specified in such order and inspect such books kept therein and may take copies of any relevant entry in any such book.

(2) For the purpose of this section —

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"bank" has the same meaning as in section 41 of the Banking Decree 1969 and, for the avoidance of doubt, includes any bank exempted from the provisions of that Decree;

"banker's book" includes ledgers, day books, cash books, account books and all other books and documents used in the ordinary course of the business of a bank.

Obstruction of search, etc.

17. Any person who—

(a) refuses the Director or any person duly authorised for that purpose by the Director access to any place; or

(b) assaults, obstructs, hinders or delays him in effecting any entrance which he is entitled to effect under this Decree, or in the execution of any duty imposed or power conferred by this Decree; or

(c) fails to comply with any lawful demands of the Director or of any officer of the Bureau authorised by the Director to make such demands to the execution of his duty under this Decree; or

(d) refuses or neglects to give any information which may reasonably be required of him and which he has it in his power to give,

shall be guilty of an offence under this Decree and shall be liable on conviction to a fine of one thousand naira or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Director to submit report on offences to the DPP.

18. On the completion of an investigation in respect of any offence under this Decree the Director shall cause to be delivered to the Director of Public Prosecutions a report of his findings in the matter and shall when required to do so by the Director of Public Prosecutions furnish to the Director of Public Prosecutions all evidence in his custody or under his control that may be required by the Director of Public Prosecutions for the institution of proceedings before a tribunal under this Decree.

PART III

Establishment, etc. of Tribunals and Trial of Offences

Constitution of special tribunals, etc.

19.—(1) The Head of the Federal Military Government shall, whenever occasion demands, constitute one or more tribunals for the trial of offences under this Decree.

(2) A tribunal constituted under subsection (1) of this section shall consist of a chairman who shall be a judge of the High Court of a State or of the Federal Revenue Court and two other persons at least one of whom shall be an officer in the Nigerian Army not below the rank of major or an officer of the Nigerian Navy or Air Force of equivalent rank.

Procedure for the trial of offences.

20.—(1) The trial of offences under this Decree shall commence by way of application, supported by evidence on affidavit, made to the tribunal in that behalf by the Director of Public Prosecutions or by such officers subordinate to him as the Director of Public Prosecutions may authorise to do so;

Provided that the question whether any authority has been given in pursuance of this subsection or what the authority was, shall not be enquired into by any person except at the instance of the Director of Public Prosecutions.

(2) Whereafter perusal of the application and the evidence or affidavit or any further evidence in such form as the tribunal may consider necessary the tribunal is satisfied that any person appears to have committed any offence under this Decree, [?] shall cause notice to be served on that person calling upon him to show cause why he should not be punished for that [????]

(3) Where no cause or no sufficient cause under subsection (2) above is shown by the person on whom a notice is served under that subsection to its satisfaction, the tribunal may, after such inquiry as the tribunal may consider necessary, convict that person of the offence and impose upon him an appropriate sentence in accordance with the provisions of this Decree.

(4) The procedure to be followed upon an application to the tribunal under subsection (1) above shall be in accordance with such rulings as the tribunal may make either generally or for the purpose of a particular trial; and in relation to and for the purpose of proceedings of the tribunal the tribunal shall have the same powers, whether of compelling the attendance of persons and the production of documents or otherwise, as the High Court of a State has in the exercise of its ordinary jurisdiction.

(5) An offender under this Decree shall be entitled to defend himself in person or by a person of his own choice

who is a legal practitioner, and to examine in person or by his legal practitioner, if he so wishes, any person whose evidence on affidavit or otherwise forms part of the case against him.

Evidence of pecuniary resources or property.

21.—(1) In any trial for an offence under this Decree the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the tribunal as corroborating the testimony of any witness in such trial or inquiry that such accused person accepted or obtained any gratification and as showing that such gratification was accepted or obtained corruptly as an inducement or reward.

(2) An offender shall, for the purposes of subsection (1) of this section be deemed to be in possession of resources of property or to have obtained an accretion thereto where such resources or property are held or such accretion is obtained by any other person whom, having regard to his relationship to the accused person or to any other circumstances, there is reason to believe to be holding such resources or property or to have obtained such accretion in trust for or on behalf of such accused person or as a gift from such accused person.

Evidence of accomplice.

22. Notwithstanding anything to the contrary in any law (including any rule of law), no witness shall, in any such trial or inquiry as is referred to in section 20 of this Decree, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

Witness to be compellable in certain cases.

23.—(1) Whenever two or more persons are charged with an offence under this Decree the tribunal may require one or more of them to give evidence as a witness for the prosecution.

(2) Any person who refuses to be sworn or to answer any lawful question after having been required to do so pursuant to subsection (1) above may be dealt with in the same manner as a witness so refusing may be dealt with by a High Court.

(3) Any person required to give evidence under this section and who in the opinion of the tribunal makes true and full, disclosure of all things as to which he is lawfully examined shall be entitled to receive a certificate of indemnity under the hand of the chairman of the tribunal, stating that he has made a true and full disclosure of all things as to which he was examined, and such certificate shall be a bar to all legal proceedings against him in respect of all such things aforesaid.

Protection of informers.

24.—(1) Except as hereinafter provided, no complaints as to an offence under this Decree shall be admitted in evidence or liable to inspection in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named, described or which might lead to his discovery the tribunal, before which the proceeding is held, shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on a trial for any offence under this Decree the tribunal, after full inquiry into the case, is of opinion that the informer wilfully made in his complaints a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the tribunal is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the tribunal may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

Provided, however, that where the Director of Public Prosecutions certifies in writing that it is not in the public interest to make such a disclosure the tribunal shall not, notwithstanding any rule of law to the contrary, permit any such inquiry or disclosure of the informer.

PART IV

Supplementary

Parties to offences.

25. Any person who—

(a) aids, counsels, abets or procures any person to commit an offence under this Decree, or

(b) conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed,

shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Decree.

Liability of citizens of Nigeria for offences committed outside Nigeria.

26. The provisions of this Decree shall, in relation to citizens of Nigeria, have effect outside as well as within Nigeria, and where an offence under this Decree is committed by a citizen of Nigeria in any place outside Nigeria he may be dealt with in respect of such offence as if it had been committed within Nigeria.

Provided that any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the offence, if such offence had been committed in Nigeria, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Nigeria.

No convictions where gratification is proved customary.

27.—(1) Subject to subsection (2) of this section, no person charged with any offence under this Decree being an offence involving the receipt of gratification shall be convicted of that offence if he proves that the receipt of the gratification is customary in his profession, trade, vocation or calling and the tribunal is satisfied that the amount of the gratification was reasonable in the circumstances of the case.

(2) Subsection (1) of this section shall not apply in respect of any offence by a person in the employment of the Government or any department thereof or of any public body.

Right to appeal to the Supreme Court.

28. Any person convicted of an offence under this Decree may within 30 days of the date of his conviction appeal as of right to the Supreme Court and the provisions of any enactment (including rules of court) regulating the practice and procedure of the Supreme Court shall, with any necessary modifications, apply in respect of such an appeal as they apply

in respect of appeals from the decisions of any court subordinate to the Supreme Court.

Supplementary provisions.

29.—(1) It is hereby declared that a tribunal shall, notwithstanding anything to the contrary in any law (including the Constitution of the Federation or of a State) have the power in appropriate cases to award the punishments and impose the penalties specified in this Decree.

(2) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any matter or thing done or proposed or purported to be done under this Decree by the Head of the Federal Military Government or by any person acting in accordance with the authority of the Head of the Federal Military Government or by the Director or any other officer of the Bureau or by any member or other officer of a tribunal constituted under this Decree.

1963 No. 20.

(3) The question whether any provision of Chapter III of the Constitution of the Federation has been, is being or would be contravened by anything done or proposed or purported to be done in pursuance of this Decree shall not be inquired into by any court of law.

Interpretation

30. In this Decree, unless the context otherwise requires—

"agent" means any person employed by or acting for another and includes a trustee, administrator and executor, and a person serving the Government or under any corporation or public body, and for the purposes of section 4 of this Decree, includes a sub-contractor and any person employed by or acting for such sub-contractor;

"Director" means the Director of the Corrupt Practices Investigation Bureau appointed under section 11 of this Decree;

"the Government" means the government of the Federation or of a State;

"gratification" includes—

(a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether moveable or immoveable;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;

(ATTACHMENT TO AUGUST 26, 1986 LETTER FROM T. RUTTER TO HON. ALFRED LECHNER)

July 31, 1986 letter from T. Rutter to the Embassy of Nigeria is reproduced at A-124-126.

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ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,	:	
Plaintiff,	:	IN THE UNITED STATES
- against -	:	DISTRICT COURT FOR THE
W.S. KIRKPATRICK & CO., INC., DIC (HOLDING) INC., INTERNATIONAL DEVELOPMENT CORPORATION, BENSON "TUNDE" AKINDELE, JOHN M. KRANKEL, W.S. KIRKPATRICK & CO., INTERNATIONAL, EMRO ENGINEERING CO., INC., ROBERT W. RUPPERT, ROSS E. SAXON, and R.H. EDWARDS	:	DISTRICT OF NEW JERSEY
	:	Civil Action No. 86-796 AJL
Defendants.	:	

SUBMISSION OF W.S. KIRKPATRICK & CO., INC. AND D.I.C. (HOLDING) INC. IN RESPONSE TO QUESTIONS POSED BY THE COURT ON AUGUST 20, 1986

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SUBMISSION OF W.S. KIRKPATRICK & CO., INC. AND D.I.C. (HOLDING) INC. IN RESPONSE TO QUESTIONS POSED BY THE COURT ON AUGUST 20, 1986

This submission is in response to questions posed by the Court in a telephone conference on August 20, 1986. Each question is answered individually herein. Taken together, the responses to these questions, the Amended Complaint, the Motions to Dismiss and all accompanying and opposing memoranda make clear that summary judgment should be granted against plaintiff in this action, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In reviewing these responses, this Court should recognize that it may have misunderstood certain facts set forth in the pleadings and papers. Specifically, the questions refer to the payments at issue as "bribes," which suggests that this Court might have concluded that the bribery alleged in this action is an established fact. We believe, however, that it is presently unknown whether these payments were ever made, or even offered, to any officials and/or other representatives of the Government of Nigeria. Therefore, these payments cannot be accurately described as bribes, and proof that these payments were bribes remains to be offered by the plaintiff herein.

All that is known thus far is that Benson "Tunde" Akindele, a Nigerian national who served as the local agent for W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") on the aeromedical contract at issue, told Kirkpatrick to pay a 20% commission to two companies under his control, and that he would then distribute this commission among various Nigerian government officials and entities. Kirkpatrick followed Mr. Akindele's instructions and paid the commission to the companies. However, Kirkpatrick has no knowledge of whether Mr. Akindele thereafter distributed the commission in the manner he had described.

It is well recognized that payments intended as bribes frequently do not reach their intended governmental recipients.

Foreign and Corporate Bribes: Hearings on S.3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 39 (1976) (testimony of George Ball, former Under Secretary of State); Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Foreign Payments Abroad, to Sen. William Proxmire, June 11, 1976, at 3. For example, in a celebrated case, Adnan Khashoggi, a well-known sales agent in the Middle East, retained $450,000 that have been given to him by Northrop Corp. to pass on to two air force generals in Saudi Arabia. *Time*, Feb. 23, 1976, at 33, col. 1.

Kirkpatrick pled guilty in the criminal proceeding despite the lack of knowledge regarding the actual distribution of the commission because the lack of such knowledge was not a defense to Kirkpatrick for alleged violations of the Foreign Corrupt Practices Act (the "Act"). Under the Act, a violation is established if a business entity provides monies to an intermediary and has a "reason to know" that such monies will be offered or paid to foreign government officials in connection with obtaining business. Foreign Corrupt Practices Act, 15 U.S.C. § 78-dd-2(a) (3). Thus, the government's position was that the payment by Kirkpatrick to the two companies, with knowledge of Mr. Akindele's stated intent, constituted a violation. The Justice Department could not prove and did not possess any evidence, to our knowledge, that any money actually went to a Nigerian government official or that the offer of any money actually influenced or caused the awarding of the contract.

For all of these reasons, Kirkpatrick pled guilty on November 18, 1985 to one count of violating the Act. Kirkpatrick's conviction, however, in no way establishes these payments as bribes.

RESPONSES TO QUESTIONS

Question 1:

Is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

Response to Question 1:

The relevant laws of Nigeria are attached as Exhibit A. Even a brief review of these laws, in the absence of expertise in the Nigerian legal system, makes clear that bribery is a serious offense in Nigeria and corruption of public officials a grave national concern. Specifically, in Nigeria, it is prohibited for a public servant to (i) accept or (ii) obtain or (iii) agree to accept or (iv) attempt to obtain any gratification, other than lawful remuneration, as a motive or reward for official actions. Severe punishment, including both imprisonment and fines, may be imposed for such conduct.

In light of the above, the Court should appreciate, and afford due consideration to, the fact that this action cannot be resolved without determining whether Nigerian officials violated Nigeria's laws. Such a determination is necessary since a critical element of proof under the Robinson-Patman Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the New Jersey Anti-Racketeering Act is that the Government of Nigeria and/or its officials and other representatives agreed to accept, and accepted, bribes in return for awarding the aeromedical contract to Kirkpatrick. Unless Environmental Tectonics Corporation, International ("ETC") proves these facts, ETC will fail to establish that Kirkpatrick improperly influenced the decision to award the contract to Kirkpatrick.

Further, assuming that proof of payments to Nigerian officials is presented by plaintiff, Kirkpatrick, in its defense, would also necessarily seek additional evidence that establishes that Nigerian officials and/or representatives violated Nigerian laws, not only in this instance, but in other cases and as a

matter of course. Specifically, Kirkpatrick would attempt to show that Nigerian officials and/or other representatives required the payment of bribes in most, if not all, construction projects like the one involved in this case. First, Kirkpatrick would claim that it made the payments at issue only because Mr. Akindele first advised Kirkpatrick that the Nigerian government would not award the contract to any company that did not make such payments. Second, Kirkpatrick would argue that no company, including ETC, would have been awarded the contract without making such payments because the normal practice was to demand them. Third, Kirkpatrick would contend that, in objecting to being deprived of the contract, ETC is in effect objecting to being deprived of its "right" to make these payments itself.

The importance which the Government of Nigeria places upon the crime of bribery is evident by the reaction of that government to the Justice Department investigation of Kirkpatrick. According to Steven M. Levy, the Justice Department attorney who conducted the investigation, the Nigerian government is extremely interested in receiving further information about the case, including the names of any persons who were involved on behalf of the Nigerian government. Mr. Levy indicated at the sentencing hearing of Kirkpatrick on January 6, 1986 that the Nigerian government has made numerous attempts to obtain such information from the Justice Department. The relevant pages of the transcript of this hearing are attached as Exhibit D, with the entire transcript attached as Exhibit E.

Of immediate relevance to the Act of State issue is Mr. Levy's disclosure at the sentencing hearing that the State Department was involved with, and "very concerned" about the consequences of disclosure of, the facts of the incident and the investigation from a foreign relations' perspective. Specifically, Mr. Levy stated:

> . . . I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very

> concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State Department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

See Exhibit D.

The Act of State doctrine is designed specifically to prevent judicial intrusion into a situation of this nature which is constitutionally entrusted to the State Department and the Executive Branch. Indeed, given the basis for the doctrine, it would not matter if the present government of Nigeria consented to the litigation of this action, since the State Department might very well conclude, regardless of such consent, that the overall political and international effect would be negative. Here, it is clear that the State Department is concerned about the effects of disclosure of certain information upon relations between the United States and the Government of Nigeria. Since the State Department's concerns are manifest, this Court should not entertain this action, which would constitute judicial intervention in an area of executive concern.

Question 2:

Did Nigeria compel the payment of the bribe under penalty of loss of the contract?

Response to Question 2:

Kirkpatrick's knowledge on this subject is derived from two memoranda, which are attached hereto as Exhibits B and C. These memoranda establish that Mr. Akindele advised Kirkpatrick that the Nigerian government, as a matter of course, required payments as bribes to be made by any company that is awarded a Nigerian government contract. Specifically, the March 30, 1981 memorandum, which is attached as Exhibit B, states that Mr. Akindele's attorney advised Kirkpatrick that such payments are "required and asked for by the customers." Further, the memoranda make clear that Mr. Akindele advised Kirkpatrick that it would not have been awarded the contract unless it paid money to Nigerian officials and/or representatives. For example, according to the March 30, 1981 memorandum, Mr. Akindele, in advising Kirkpatrick to pay a bribe, "reviewed in great detail *the habit of Nigeria and the expectations of many*, and stated that we *must* think in terms of a 20% margin . . . to put the project 'over the top' (emphasis supplied)."

Question 3

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

Response to Question 3

While Kirkpatrick has not communicated directly with the Government of Nigeria on this subject, Kirkpatrick believes that the Nigerian Government has been so informed. The basis for this belief is as follows. First, Mr. Levy's statements during Kirkpatrick's sentencing hearing indicate that the Government of Nigeria has some knowledge of this issue. Second, defendant Harry G. Carpenter, Jr., the company's former Chairman of the Board and Chief Executive Officer, stated in support of his assertion of Fifth Amendment privilege that he has been advised by Mr. Akindele that this issue had been reported in Nigerian newspapers. Third, Thomas B. Rutter, counsel for ETC, advised Thomas H. Sear, counsel for

Kirkpatrick, that Rutter's firm recently contacted Nigerian officials, notified them of this action and of the alleged bribery, and requested a statement indicating that they did not object to this action.

Kirkpatrick is not aware of the results of Rutter's contact with the Nigerian government, that is, whether the Nigerian government is prepared to state that it has no objection to the pursuit of this action. However, as noted earlier, the Nigerian government's position on this matter is irrelevant under the Act of State doctrine. This doctrine is designed to preserve the principle of separation of powers between the judiciary and the executive. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Since relations with foreign countries fall under the purview of the executive, the judiciary is barred from intervening in this arena. *See id.* The opinion of a foreign government regarding the effect of judicial intervention does not alter the fact that relations with that country are an executive, and not a judicial, concern and that the executive branch might not desire judicial intervention for a number of valid reasons.

Further, the judiciary cannot appreciate all of the reasons why a foreign country may issue such a statement, and therefore cannot – and indeed should not – evaluate the effect on foreign relations of pursuing a particular case. For example, a government that is in power at the time of the incident that gave rise to the action may be out of power at the time the action is filed. That government may be friendly to the United States while the government that succeeds it is unfriendly. The successor, unfriendly government may benefit politically from having the action regarding the prior, friendly government be pursued in our courts. Yet the effect of such pursuit may be disastrous from the perspective of the United States. That the judiciary is not in a position to evaluate such considerations, and cannot do so without violating the principle of separation of powers, is the premise of the Act of State doctrine. *See generally id.* It is for all of these reasons that the opinion of the Nigerian government regarding the pursuit of this action is of no consequence here.

Under the circumstances, we believe that the contact of counsel for ETC with the Nigerian government is not appropriate and offends the spirit, if not the letter, of the Act of State doctrine. It is for the executive branch of our government to communicate with the Nigerian government regarding such sensitive matters as bribery of Nigerian governmental officials. Such a step is not one to be taken by an individual in pursuit of a private action in federal court, unbeknownst to the State Department.

Indeed, we submit that the action of ETC's counsel is particularly inappropriate since this Court has not yet decided whether this action is barred by the Act of State doctrine. Unless and until this Court decides, all parties to this action should refrain from engaging in any conduct which involves the government of Nigeria in this regard.

Question 4

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants in this case?

Response to Question 4

The Government of Nigeria has not sought legal redress against Kirkpatrick or D.I.C. (Holding) Inc. ("D.I.C. Holding"). Kirkpatrick and D.I.C. Holding have no knowledge regarding whether legal redress has been sought against any of its governmental representatives or anyone else, except that Mr. Carpenter has indicated that he has been advised that legal redress has been threatened against him.

Question 5

Who are the medical group, the party and the minister (as set forth in paragraph 35 of the Amended Complaint)?

Response to Question 5

The knowledge of the defendants who prepared this submission regarding these names is derived from the memorandum dated March 8, 1982, which is attached as Exhibit C. Regarding those names, the memorandum states:

> During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:
>
> 2 1/2 – for Akindele
> 5 – for air force
> 2 1/2 – medical group
> 5 – party
> 2 1/2 – minister himself
> 2 1/2 – other key defense personnel

Litigation and resolution of this action, of course, would require inquiry into the identities and actions of the above-listed individuals and entities. Under the circumstances, since it is the plaintiff who sets forth allegations regarding these individuals and entities in the Amended Complaint, the plaintiff is the party best suited to provide the information the Court seeks.

Question 6

Has the contract been completed? Have all obligations been performed under the contract? Have the goods and supplies been delivered? Has the base been constructed?

Response to Question 6

Kirkpatrick has completed 95% of its obligations pursuant to the contract.* It had not completed the remaining 5% of its

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* Kirkpatrick expects to submit to the Court next week a clean, readable copy of the contract, as per the Court's request. The copy will be made from the original contract, which is currently in the possession of Justice

(Footnote continued)

obligations by the time the criminal investigation commenced. Kirkpatrick did not perform any services on the contract following the commencement of the criminal investigation and has no intention of doing so at any time. Kirkpatrick believes that Nautilus Enviromedical Systems, Inc., one of the subcontractors on the original contact, has arranged with the Government of Nigeria to complete the contract and is currently in the process of doing so.

Question 7

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when? Has the Nigerian Government challenged in any way the contract or the parties to the contract?

Response to Question 7

This question is best answered by reference to the Response to Question 1, *supra* at 3, and the Response to Question 4, *supra* at 11.

Question 8

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

Department investigators. These investigators have retained possession of all documents produced to the government by Kirkpatrick in the course of the grand jury investigation which led to Kirkpatrick's guilty plea.

Kirkpatrick made every effort to obtain a copy of the contract in time to submit it to the Court today. The company was unsuccessful because of the time necessary for the government to consider Kirkpatrick's request. However, Mr. Levy has assured Kirkpatrick that he will send to Kirkpatrick by next week the clearest and most readable copy of the contract that the investigators were able to make. Kirkpatrick will immediately forward this copy to the Court.

Response to Question 8

Bribery of government officials is expressly prohibited in virtually all countries in the world. See, e.g., Foreign and Corporate Bribes: Hearings on S.3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 84-85 (1976) (testimony of Leonard Meeker, Center for Law and Social Policy; *id.* at 103 (testimony of Elliot Richardson, Secretary of Commerce); Ad Hoc Committee on Foreign Payments, The Association of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problems and Approaches to a Solution, note 4, at 25 (Mar. 14, 1977). A survey of bribery laws in 65 countries, including Nigeria, is set forth below:

COUNTRIES WITH LAW PENALIZING FOR LESS THAN 5 YEARS

Barbados	Iran	St. Lucia
Burundi	Israel	Saudi Arabia
Chile	Jamaica	Senegal (3)
Dominican Republic	Jordan	Sierra Leone (5)
Ethiopia	Liberia	Sudan (5)
Greece	Morocco	Tanzania (3)
Guatemala	Nicaragua	Togo (5)
Guyana	Pakistan	Western Samoa (3)
Honduras	Paraguay	Zaire (3)
India	Philippines	Zambia (3)

PENALTIES OF GREATER THAN 6 TO 10 YEARS

Argentina	Haiti	Singapore (7)
Bolivia	Indonesia	Sri Lanka (Ceylon) (7)
Brazil	Ivory Coast	Swaziland (7)
Cameroon	Kenya	Trinidad and Tobago (7)
China	Korea	Tunisia (10)
Colombia	Laos	Turkey (10)
Costa Rica	Malagasy Republic	Upper Volta (10)
Ecuador	Malaysia	Venezuela (8)

Egypt	Mali	Yemen Arab Republic (10)
El Salvador	Nigeria	Yugoslavia (10)
Grenada	Panama	
Guinea	Romania	

PENALTY OF 20 YEARS

Thailand

[The numbers in parenthesis indicate the maximum penalty in years]. To Require Certain Actions by the Overseas Private Investment Corporation: Hearings Before the Subcommittee on International Economic Policy of the House Committee on International Relations, 94th Cong. 2d Sess. 5 (1976).

While it often is difficult to determine exactly what constitutes a "bribe" under the laws of a particular country, payments to obtain or maintain government business almost invariably do so. *See* Prohibiting Bridges to Foreign Officials: Hearing on S.3133, S.3379, and S.3418 Before the Senate Comm. on Banking, Housing and Urban Affairs at 14-17 (testimony of Roderick Hills, Chairman of the Securities and Exchange Commission). John J. McCloy, Chairman of the Gulf Oil Special Review Committee which investigated questionable payments made by this major multinational, testified before the Senate Committee on Banking, Housing and Urban Affairs that the Gulf Committee "could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country." Senate Hearings on Foreign and Corporate Bribes, *supra*, at 6.

Bribery is generally viewed to be both politically debilitating and a national disgrace. Indeed, such was the reasoning of the Congress in deciding to promulgate the Foreign Corrupt Practices Act. President Carter, while signing the legislation, emphasized its basic policy considerations:

> I share in Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries.

13 Weekly Comp. of Pres. Doc. 1909 (Dec. 20, 1977). Thus, pursuit of this action would invariably prove humiliating to the Government of Nigeria since, if the plaintiff's allegations are true, it would involve the Nigerian Government publicly in actions which are internationally recognized as disgraceful. By showing that the government of Nigeria at one time engaged in internationally sanctioned conduct, this action touches upon and necessarily involves foreign relations with Nigeria. As discussed *supra*, the conduct of foreign relations is an executive concern, and this Court is barred from hearing this action, and thereby intervening in foreign relations by the Act of State doctrine.

Question 9

Who initiated the concept of the bribe, the defendants or the Nigerians?

Response to Question 9

Mr. Akindele initiated the concept to Kirkpatrick. Based on Mr. Akindele's statements, Kirkpatrick believes that officials and/or other representatives of the Nigerian Government initiated the concept to Mr. Akindele by making it clear to him that they would not consider any bid for the contract unless a commission was distributed to them.

Question 10

Is this type of pleading (specifically with regard to the allegations set forth in Paragraph 57 of the Amended Complaint) legally sufficient under the RICO setting?

Response to Question 10

The memorandum accompanying the Motion to Dismiss filed by Kirkpatrick on May 13, 1986 makes clear, on pages 16 to 18, that the allegations set forth in Paragraph 57 are conclusory, lack any basis in fact, and are legally insufficient.

ETC apparently makes these allegations in an effort to overcome the fact that the Amended Complaint fails to meet the pattern requirement of RICO set forth in 18 U.S.C. §1962(c). This section states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a *pattern of racketeering activity* . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce (emphasis supplied).

In Section 1961(5), the words "pattern of racketeering activity" are defined to require at least two acts of racketeering activity. Recent decisions make clear that these acts must arise out of different criminal episodes. Acts that arise out of the same episode, such as separate payments of a single bribe, do not establish a pattern under RICO. *See, e.g., Savastano N. Thompson Medical Co., Inc.*, slip op. (S.D.N.Y. Aug. 1, 1986); *Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, slip op., (E.D. Pa. July 17, 1986); *Wright v. Everett Cash Mutual Insurance Co.*, slip op., (W.D. Pa. June 20, 1986); *Kredietbank, N.V. v. Joyce Morris, Inc.*, slip op., (D.N.J. Jan. 9, 1986); *Soper v. Simmons International, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, slip op., (W.D. Okla. August 30, 1985).

In the Amended Complaint, ETC apparently seeks to satisfy the pattern requirement of RICO by alleging that the commission requested by Mr. Akindele was paid in four separate transfers of money. These allegations are set forth in paragraphs 30 through 37. However, these allegations, even if true, fail to establish a pattern under RICO since each payment arose out of the same alleged crime.

In *Inryco*, for example, the court dismissed a complaint against a defendant on grounds that the complaint failed to allege a pattern as against him. The court there found that plaintiff's allegations that defendant's payments and mailings related to the same fraudulent scheme did not satisfy the pattern requirement. *Inryco, supra*, 615 F. Supp. at 831-33. The court stated:

> Surely the continuity inherent in the term [pattern] presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity." (emphasis original.)

Id. at 831.

CONCLUSION

In light of all the information currently before this Court, summary judgment should be granted against plaintiff.

Dated: August 27, 1986
New York, New York

Respectfully submitted,

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NIGERIA

The Corrupt Practices Decree No. 38 of November 22, 1975[1] contains the following provisions concerning all federal offenses involving corruption of public officials, including bribery and extortion:

CORRUPT PRACTICES DECREE 1975

ARRANGEMENT OF SECTIONS

Section

Part I—Offences involving Corruption

1. Punishment of corruption.
2. Punishment of corrupt transaction with agents.
3. Increase of maximum penalty in certain cases.
4. Presumption of corruption in certain cases.
5. Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.
6. Corruptly procuring withdrawal of tenders.
7. Bribery of member of the Supreme Military Council, the National Council of States or Federal Executive Council, etc.
8. Bribery of member of public body.
9. Penalty to be imposed in addition to other punishment.
10. Principal may recover amount of secret gift.

Part II—Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

11. Establishment of Bureau.
12. General powers of investigation.
13. Director, etc. to have powers of a police officer.
14. Director's powers to obtain information.
15. Powers of search and seizure.
16. Director's power to order inspection of bankers' books.

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[1] Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, Dec. 2, 1975.

17. Obstruction of search, etc.
18. Director to submit report of offences to the DPP.

Part III—Establishment, etc. of Tribunals and Trial of Offences
19. Constitution of special tribunals, etc.
20. Procedure for the trial of offences.
21. Evidence of pecuniary resources or property.
22. Evidence of accomplice.
23. Witness to be compellable in certain cases.
24. Protection of informers.

Part IV—Supplemental
25. Parties to offences.
26. Liability of citizens of Nigeria for offences committed outside Nigeria.
27. No conviction where gratification is proved customary.
28. Right of appeal to the Supreme Court.
29. Supplementary provisions.
30. Interpretation.
31. Citation.

A-184

Decree No. 38

[*22nd November 1975*]

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:—

PART I

Offences Involving Corruption

Punishment of corruption.

1. Any person who by himself or by or in conjunction with any other person—

(*a*) corruptly solicits or receives or agrees to receive for himself or for any other person; or

(*b*) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement or reward for, or otherwise on account of—

(*i*) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(*ii*) any member, officer or servant of the government or any public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such government or public body in concerned;

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a

fine of five thousand naira or to both such imprisonment and fine.

Punishment of corrupt transaction with agents.

2. If—

(*a*) any agent corruptly accepts or obtains or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do, any act in relation to the affairs or business of his principal, or for showing favour or disfavour to any person in relation to the affairs or business of his principal; or

(*b*) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Decree done or forborne to do any act in relation to the affairs or business of the principal or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal;

he shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Increase of maximum penalty in certain cases.

3. A person convicted of any offence under section 1 or 2 of this Decree shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any department thereof or with any public body or a sub-contract to execute

any work comprised in such a contract, be liable to imprisonment for a term of fourteen years or to a fine of ten thousand naira or to both such imprisonment and fine.

Presumption of corruption in certain cases.

4. Where is any proceedings against a person for an offence under section 1 or 2 of this Decree, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.

5.—(1) Where in any proceedings against any agent for any offence under paragraph (*a*) of section 2 of this Decree, it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that such gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to the affairs or business of his principal, he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he accepted the gratification without intending so to do, show or forbear or that he did not in fact so do, show or forbear or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

(2) Where in any proceedings against any person for any offence under paragraph (*b*) of section 2 of this Decree, it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or reward for doing

or forbearing to do any act or for showing or forbearing to show any favour or disfavor to any person having reason to believe or suspect that such agent had the power, right or opportunity so to do, show or forbear and that such act, favour or disfavour was in relation to the affairs or business of the principal, he shall be guilty of an offence under that section notwithstanding that such agent had no power, right or opportunity or that such act, favour or disfavour was not in relation to the affairs or business of the principal.

Corruptly procuring withdrawal of tenders.

6. A person—

(*a*) who, with intent to obtain from the Government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for such contract, as an inducement or a reward for his withdrawing such tender; or

(*b*) who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such a contract,

shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for seven years or to a fine of five thousand naira or to both such imprisonment and fine.

Bribery of member of the Supreme Military Council, the National Council of States or the Executive Council, etc.

7. Any person—

(*a*) who offers any gratification to a member of the Supreme Military Council, the National Council of States or the Federal Executive Council or a member of the Executive Council of a State as an

inducement or reward for such member to do or forbear to do any act in his capacity as such member; or

(*b*) who, being a member of any of the Councils mentioned in paragraph (*a*) of this section, solicits or accepts any gratification as an inducement or reward for his doing or forbearing to do any act in his capacity as such member,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for ten years or to a fine of ten thousand naira or to both such imprisonment and fine.

Bribery of member of public body.

8. Any person—

(*a*) who offers any gratification to a member of a public body as an inducement or reward for—

(*i*) such member to vote or abstain from voting at any meeting of such public body in favour or against any measure, resolution or question submitted to such public body; or

(*ii*) such member to perform or abstain from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

(*iii*) such member to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(*b*) who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining,

as is referred to in sub-paragraphs (*i*), (*ii*) and (*iii*) or paragraph (*a*) of this section,

shall be guilty of an offence under this section and shall be liable on conviction to imprisonment for seven years or to a fine of ten thousand naira or to both such imprisonment and fine.

Penalty to be imposed in addition to other punishment.

9. Where a tribunal convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Decree, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the tribunal shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the tribunal, the value of that gratification and any such penalty shall be recoverable as a fine.

Principal may recover amount of secret gift.

10.—(1) Where any gratification has, in contravention of this Decree, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or aquittal of the defendant in respect of an offence under this Decree shall operate as a bar to proceedings for the recovery of such amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

PART II

Establishment, Powers, etc. of Corrupt Practices Investigation Bureau

Establishment of Bureau.

11.—(1) There is hereby established as a department of the Government of the Federation a Bureau to be known as the Corrupt Practices Investigation Bureau.

(2) The Bureau shall consist of a Director and such number of Assistant Directors and other officers subordinate to the Director and Assistant Directors as the Supreme Military Council may from time to time determine.

( ) The Director and the Assistant Directors shall be appointed by the Supreme Military Council and the other officers of the Bureau shall be appointed by the Public Service Commission of the Federation on the recommendation of the Director.

(4) The officers of the Bureau other than the Director and the Assistant Directors shall be known by such title as the Director may determine and the Director shall issue to every such officer a certificate under his hand which shall be evidence of that officer's appointment under this Decree.

General powers of investigation.

12. Notwithstanding anything to the contrary in any law, the Director and any officer of the Bureau authorised in that behalf by the Director either generally or with respect to any category of matters, if satisfied that there are reasonable grounds for suspecting that an offence under this Decree has been committed by any person, may make an investigation in the matter in such manner or mode as the Director may deem fit.

Director, etc., to have powers of a police officer. Cap 43. Cap 30. Laws of Northern Nigeria 1963.

13. The Director, Assistant Directors and the officers of the Bureau designated by the Director shall by virtue of this section have all the powers of a police officer and, without prejudice to the generality of the foregoing, may exercise in relation to offences under this Decree the same powers as are exercisable by a police officer under the Criminal Procedure Code in respect of offences under the Criminal Code, or as the case may be, the Penal Code.

Director's powers to obtain information. Cap. 42. Cap. 89.

14.—(1) In the course of any investigation or proceedings into or relating to an offence under this Decree by any person in the service of the Government or of any department thereof or of any public body under this Decree the Director may, notwithstanding anything to the contrary in any other law, by written notice—

(*a*) require any such person to furnish a sworn statement in writing enumerating all moveable or immovable property belonging to or possessed by such person and by the spouse and children of such person, and specifying the date on which each of the properties enumerated was acquired whether by way or purchase, gift, bequest, inheritance or otherwise;

(*b*) require any such person to furnish a sworn statement in writing of any money or other property sent out of Nigeria by him or paid or delivered to him or to his account outside Nigeria during such period as may be specified in the notice;

(*c*) require any other person to furnish a sworn statement in writing enumerating all moveable or immovable property belonging to or possessed by such person where the Director has reasonable

grounds to believe that such information can assist the investigation;

(*d*) require the person in charge of any department, office or establishment of the Government, or the chairman, chief executive, manager or similar officer of any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;

(*e*) require the manager of any bank to give copies of the accounts of such person or of the spouse or child of such person at the bank.

(2) Every person to whom a notice is sent by the Director under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects or fails so to comply shall be guilty of an offence under this Decree and shall be liable on conviction to imprisonment for one year or to a fine of one thousand naira or to both.

Powers of search and seizure.

15.—(1) Whenever it appears to the Director upon information and after such enquiry as he thinks necessary that there is reasonable cause to believe that in any place there is any document containing any evidence of the commission of an offence under this Decree or any article or property relating to the commission of an offence under this Decree the Director may, by warrant directed to any officer of the Bureau, empower the officer named therein to enter such place by force if necessary and search for, seize and detain any such document, article or property.

(2) Whenever it appears to any officer of the Bureau other than the Director, that there is reasonable cause to believe

that in any place there is concealed or deposited any document containing evidence of the commission of an offence under this Decree and the officer as aforesaid has reasonable grounds for believing that by reason of the delay in obtaining a warrant the object of the search is likely to be frustrated, that officer may exercise in and in respect of such place all the powers mentioned in subsection (1) of this section in as full and ample a manner as if he were empowered to do so by warrant issued under the said subsection.

Director's power to order inspection of bankers' books.

16.—(1) The Director may, if he considers that any evidence of the commission of an offence under this Decree by any person in the service of the Government or of any department thereof or of a public body is likely to be found in any banker's book relating to such person, his wife or child or to a person reasonably believed by the Director to be a trustee or agent for such person, by order under his hand authorise any officer of the Bureau named in the order to inspect any such book and the person so authorised may, at all reasonable times, enter the bank specified in such order and inspect such books kept therein and may take copies of any relevant entry in any such book.

(2) For the purpose of this section—

"bank" has the same meaning as in section 41 of the Banking Decree 1969 and, for the avoidance of doubt, includes any bank exempted from the provisions of that Decree;

"banker's book" includes ledgers, day books, cash books, account books and all other books and documents used in the ordinary course of the business of a bank.

Obstruction of search, etc.

17. Any person who—

(*a*) refuses the Director or any person duly authorised for that purpose by the Director access to any place; or

(*b*) assaults, obstructs, hinders or delays him in effecting any entrance which he is entitled to effect under this Decree, or in the execution of any duty imposed or power conferred by this Decree; or

(*c*) fails to comply with any lawful demands of the Director or of any officer of the Bureau authorised by the Director to make such demands in the execution of his duty under this Decree; or

(*d*) refuses or neglects to give any information which may reasonably be required of him and which he has it in his power to give,

shall be guilty of an offense under this Decree and shall be liable on conviction to a fine of one thousand naira or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Director to submit report on offences to the DPP.

18. On the completion of an investigation in respect of any offence under this Decree the Director shall cause to be delivered to the Director of Public Prosecutions a report of his findings in the matter and shall when required to do so by the Director of Public Prosecutions furnish to the Director of Public Prosecutions all evidence in his custody or under his control that may be required by the Director of Public Prosecutions for the institution of proceedings before a tribunal under this Decree.

PART III

Establishment, etc. of Tribunals and Trial of Offences

Constitution of special tribunals, etc.

19.—(1) The Head of the Federal Military Government shall, whenever occasion demands, constitute one or more tribunals for the trial of offences under this Decree.

(2) A tribunal constituted under subsection (1) of this section shall consist of a chairman who shall be a judge of the High Court of a State or of the Federal Revenue Court and two other persons at least one of whom shall be an officer in the Nigerian Army not below the rank of major or an officer of the Nigerian Navy or Air Force of equivalent rank.

Procedure for the trial of offences.

20.—(1) The trial of offences under this Decree shall commence by way of application, supported by evidence on affidavit, made to the tribunal in that behalf by the Director of Public Prosecutions or by such officers subordinate to him as the Director of Public Prosecutions may authorise to do so:

Provided that the question whether any authority has been given in pursuance of this subsection or what the authority was, shall not be enquired into by any person except at the instance of the Director of Public Prosecutions.

(2) Whereafter perusal of the application and the evidence on affidavit or any further evidence in such form as the tribunal may consider necessary the tribunal is satisfied that any person appears to have committed any offence under this Decree, it shall cause notice to be served on that person calling upon him to show cause why he should not be punished for that offence.

(3) Where no cause or no sufficient cause under subsection (2) above is shown by the person on whom a notice is served under that subsection to its satisfaction, the tribunal

may, after such inquiry as the tribunal may consider necessary, convict that person of the offence and impose upon him an appropriate sentence in accordance with the provisions of this Decree.

(4) The procedure to be followed upon an application to the tribunal under subsection (1) above shall be in accordance with such rulings as the tribunal may make either generally or for the purpose of a particular trial; and in relation to and for the purpose of proceedings of the tribunal the tribunal shall have the same powers, whether of compelling the attendance of persons and the production of documents or otherwise, as the High Court of a State has in the exercise of its ordinary jurisdiction.

(5) An offender under this Decree shall be entitled to defend himself in person or by a person of his own choice who is a legal practitioner, and to examine in person or by his legal practitioner, if he so wishes, any person whose evidence on affidavit or otherwise forms part of the case against him.

Evidence of pecuniary resources or property.

21.—(1) In any trial for an offence under this Decree the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the tribunal as corroborating the testimony of any witness in such trial or inquiry that such accused person accepted or obtained any gratification and as showing that such gratification was accepted or obtained corruptly as an inducement or reward.

(2) An offender shall, for the purposes of subsection (1) of this section be deemed to be in possession of resources of property or to have obtained an accretion thereto where such resources or property are held or such accretion is obtained by

any other person whom, having regard to his relationship to the accused person or to any other circumstances, there is reason to believe to be holding such resources or property or to have obtained such accretion in trust for or on behalf of such accused person or as a gift from such accused person.

Evidence of accomplice.

22. Notwithstanding anything to the contrary in any law (including any rule of law), no witness shall, in any such trial or inquiry as is referred to in section 20 of this Decree, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

Witness to be compellable in certain cases.

23.—(1) Whenever two or more persons are charged with an offence under this Decree the tribunal may require one or more of them to give evidence as a witness for the prosecution.

(2) Any person who refuses to be sworn or to answer any lawful question after having been required to do so pursuant to subsection (1) above may be dealt with in the same manner as a witness so refusing may be dealt with by a High Court.

(3) Any person required to give evidence under this section and who in the opinion of the tribunal makes true and full disclosure of all things as to which he is lawfully examined shall be entitled to receive a certificate of indemnity under the hand of the chairman of the tribunal, stating that he has made a true and full disclosure of all things as to which he was examined, and such certificate shall be a bar to all legal proceedings against him in respect of all such things aforesaid.

Protection of informers.

24.—(1) Except as hereinafter provided, no complaints as to an offence under this Decree shall be admitted in evidence or liable to inspection in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named, described or which might lead to his discovery the tribunal, before which the proceeding is held, shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on a trial for any offence under this Decree the tribunal, after full inquiry into the case, is of opinion that the informer willfully made in his complaints a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the tribunal is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the tribunal may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer:

Provided, however, that where the Director of Public Prosecutions certifies in writing that it is not in the public interest to make such a disclosure the tribunal shall not, notwithstanding any rule of law to the contrary, permit any such inquiry or disclosure of the informer.

PART IV –

Supplementary

Parties to offences.

25. Any person who—

(*a*) aids, counsels, abets or procures any person to commit an offence under this Decree, or

(*b*) conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed,

shall be deemed to the guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Decree.

Liability of citizens of Nigeria for offences committed outside Nigeria.

26. The provisions of this Decree shall, in relation to citizens of Nigeria, have effect outside as well as within Nigeria, and where an offence under this Decree is committed by a citizen of Nigeria in any place outside Nigeria he may be dealt with in respect of such offence as if it had been committed within Nigeria:

Provided that any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the offence, if such offence had been committed in Nigeria, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Nigeria.

No conviction where gratification is proved customary.

27.—(1) Subject to subsection (2) of this section, no person charged with any offence under this Decree being an offence involving the receipt of gratification shall be convicted of that offence if he proves that the receipt of the gratification is customary in his profession, trade, vocation or calling and the tribunal is satisfied that the amount of the gratification was reasonable in the circumstances of the case.

(2) Subsection (1) of this section shall not apply in respect of any offence by a person in the employment of the Government or any department thereof or of any public body.

Right of appeal to the Supreme Court.

28. Any person convicted of an offence under this Decree may within 30 days of the date of his conviction appeal as of right to the Supreme Court and the provisions of any enactment (including rules of court) regulating the practice and procedure of the Supreme Court shall, with any necessary modifications, apply in respect of such an appeal as they apply in respect of appeals from the decisions of any court subordinate to the Supreme Court.

Supplementary provisions

29.—(1) It is hereby declared that a tribunal shall, notwithstanding anything to the contrary in any law (including the Constitution of the Federation or of a State) have the power in appropriate cases to award the punishments and impose the penalties specified in this Decree.

(2) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any matter or thing done or proposed or purported to be done under this Decree by the Head of the Federal Military Government or by any person acting in accordance with the authority of the Head of the Federal Military Government or by the Director or any other

officer of the Bureau or by any member or other officer of a tribunal constituted under this Decree.

(3) The question whether any provision of Chapter III of the Constitution of the Federation has been, is being or would be contravened by anything done or proposed or purported to be done in pursuance of this Decree shall not be inquired into by any court of law.

Interpretation:

30. In this Decree, unless the context otherwise requires—

"agent" means any person employed by or acting for another and includes a trustee, administrator and executor, and a person serving the Government or under any corporation or public body, and for the purposes of section 4 of this Decree, includes a sub-contractor and any person employed by or acting for such sub-contractor;

"Director" means the Director of the Corrupt Practices Investigation Bureau appointed under section 11 of this Decree;

"the Government" means the Government of the Federation or of a State;

"gratification" includes—

(*a*) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether moveable or immoveable;

(*b*) any office, employment or contract;

(*c*) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;

(*d*) any other service, favour or advantage of any description whatsoever, including protection from any penalty or liability incurred or apprehended of from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(*e*) any offer, undertaking or promise of any gratification within the meaning of the preceding paragraphs (*a*), (*b*), (*c*) and (*d*);

"principal" includes an employer, a beneficiary under a trust, and a trust estate as though it were a person and any person beneficially interested in the estate of a deceased person as though the estate were a person and in the case of a person serving the Government or a public body includes the Government or the public body as the case may be;

"public body" means any corporation directly established by law and includes any corporate body established or deemed to be established under the Companies Decree 1968 in respect of which the Government holds any shares, stocks or debentures;

"tribunal" means any tribunal constituted under this Decree.

Citation.

31. This Decree may be cited as the Corrupt Practices Decree 1975.

MADE at Lagos this 22nd day of November 1975.

Brigadier M.R. Muhammed,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purport)

The Decree, designed for the suppression of corrupt practices in both the public and private sectors, provides stiff penalties for any person found guilty of bribery and corruption but makes exception for bona fide customary gifts.

It sets up an autonomous Government department to be known as the Corrupt Practices Investigation Bureau, which will be headed by a Director, as the body responsible for investigating all allegations of corruption after which reports would be submitted to the Director of Public Prosecutions who will be responsible for prosecuting cases.

Such cases would be tried by special *ad hoc* tribunals comprising a judge of the High Court of a State or of the Federal Revenue Court and two other members, one of whom shall be drawn from the armed forces. Persons convicted by any such tribunal have a right of appeal to the Supreme Court.

The Penal Code Law, 1959[2] of the Northern Region of Nigeria provides the following in regard to bribery and extortion of public officials in that region:

CHAPTER X—OFFENCES BY OR RELATING TO PUBLIC SERVANTS

115. Whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration, as a motive or reward—

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[2] 1 *Annual Volumes of the Laws of the Northern Region of Nigeria 1959* A85-A88 (1960).

(*a*) for doing or forbearing to do any official act; or

(*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person; or

(*c*) for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant as such,

shall be punished—

(*i*) with imprisonment for a term which may extend to seven years or with fine or with both;

(*ii*) if such public servant is a public servant in the service of the Government of the Northern Region or of the Government of the Federation acting in a judicial capacity or carrying out the duties of a police officer, with imprisonment for a term which may extend to fourteen years or with fine or with both.

116. Whoever accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise as a motive or reward for inducing by corrupt or illegal means any public servant—

(*a*) to do or forbear to do any official act; or

(*b*) in the exercise of the official functions of such public servant to show favour or disfavour to any person; or

(*c*) to render or attempt to render any service or disservice to any person with any department of the public service or with any public servant as such,

shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

117. Whoever being a public servant, in respect of whom an offence under section 116 is committed, abets the offence, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

118. Whoever offers or gives or agrees to give any gratification whatever whether pecuniary or otherwise in the circumstances and for any of the purposes mentioned in sections 115 and 116 shall be punished with imprisonment which may extend to three years or with fine or with both.

119. Whoever being a public servant accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration or for a consideration which he knows to be inadequate—

(*a*) from any person whom he knows to have been or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant or having any connection with the official functions of himself or of any public servant to whom he is subordinate; or

(*b*) from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

120. Whoever in any of the circumstances mentioned in section 119 offers or gives or agrees to give to any public servant or to any person, in whom a public servant is interested or to whom he is related, any valuable thing without consideration or for a consideration which he knows to be inadequate, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

121. Whoever knowingly profits by any gratification or benefit obtained in any of the circumstances mentioned in section 115, 116 or 119 but does not take any active part in

obtaining such gratification or benefit, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

The following sections of Part 3, Chapter 12 of the Criminal Code Act[3] pertain to bribery and extortion of public officials in the six southern states of Nigeria, excluding Lagos state:

98. Any person who—

(1) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, not being a duty touching the administration of justice, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(2) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person employed in the public service, or to, upon, or for, any other person, any property or benefit, of any kind on account of any such act or omission on the part of the person so employed,

is guilty of a felony, and is liable to imprisonment for seven years.

99. Any person who, being employed in the public service, takes, or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay

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[3] Brett and McLean's *The Criminal Law and Procedure of the Six Southern States of Nigeria* 555, 557-558 (2d ed. 1974).

and emoluments, or any promise of such reward, is guilty of a felony, and is liable to imprisonment for three years.

100. Any person who, being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or any one in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service, is guilty of a misdemeanour, and is liable to six months' imprisonment.

Lagos state applies the following provisions in regard to bribery and extortion of public officials:[4]

98. (1) Any public official (as defined in section 98D) who—

(*a*) corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or

(*b*) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,

on account of—

(i) anything already done or omitted, or any favour or disfavour already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a government department, public body or other organisation or institution in which he is serving as a public official, or

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[4] *Id.* at 559-562

(ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid,

is guilty of the felony of official corruption and is liable to imprisonment for seven years.

(2) If in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was received by a public official, or by some other person at the instance of a public official, from a person—

(i) holding, or seeking to obtain, a contract, licence or permit from a government department, public body or other organisation or institution in which that public official is serving as such; or

(ii) concerning or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public official or a government department, public body or other organisation or institution in which that public official is serving as such,

or by or from any person acting on behalf of or related to such a person, the property, benefit or promise shall, unless the contrary is proved, be deemed to have been received corruptly on account of such a past or future act, omission, favour or disfavour as is mentioned in subsection (1) (i) or (ii).

(3) In any proceedings for an offence under this section to which subsection (1) (ii) is relevant it shall not be a defence to show that the accused—

(*a*) did not subsequently do, make or show the act, omission, favour or disfavour in question; or

(*b*) never intended to do, make or show it.

(4) Without prejudice to subsection (3), where a police officer or other public official whose official duties include the prosecution, detention or punishment of offenders is charged with an offence under this section in connection with—

(*a*) the arrest, detention or prosecution of any person for an alleged offence; or

(*b*) an omission to arrest, detain or prosecute any person for an alleged offence; or

(*c*) the investigation of an alleged offence,

it shall not be necessary to prove that the accused believed that the offence mentioned in paragraph (*a*), (*b*) or (*c*), or any other offence, had been committed.

98A. (1) Any person who—

(*a*) corruptly gives, confers or procures any property or benefit of any kind to, on or for a public official (as defined in section 98D) or to, on or for any other person; or

(*b*) corruptly promises or offers to give or confer or to procure or attempt to procure any property or benefit of any kind to, on or for a public official or to, on or for any other person,

on account of any such act, omission favour or disfavour on the part of the public official as it mentioned in section 98 (1) (i) or (ii), is guilty of the felony of official corruption and is liable to imprisonment of seven years.

(2) If in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was given to a public official, by a person—

(i) holding, or seeking to obtain, a contract, licence or permit from a government department, public body or other organisation or institution in which that public official is serving as such; or

(ii) concerning, or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public official or a government department, public body or other organisation or institution in which that public official is serving as such,

or by or from any person acting on behalf of or related to such a person, the property, benefit or promise shall unless the contrary is proved be deemed to have been given corruptly on account of such a past or future act, omission, favour or disfavour as is mentioned in section 98(1) (i) or (ii):

98B (1) Any person who—

(*a*) corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or

(*b*) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,

on account of—

(i) anything already done or omitted, or any favour or disfavour already shown to any person, by a public official (as defined in section 98D) in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business or business of a government department, public body or other organisation or institution in which the public official is serving as such; or

(ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by a public official in the discharge of his official duties or in relation to any such matter as aforesaid,

is guilty of the felony of official corruption and is liable to imprisonment for seven years.

(2) In any proceedings for an offence under this section it shall not be necessary to prove—

(*a*) that any public official counselled the commission of the offence; or

(*b*) that in the course of committing the offence the accused mentioned any particular public official; or

(*c*) that (in a case to which subsection (1) (ii) is relevant) the accused believed that any public official would do, make or show the act, omission, favour or disfavour in question; or

(*d*) that the accused intended to give the property or benefit in question, or any part thereof, to a public official.

Prepared by Edward Sourian
Senior Legal Specialist
Near Eastern and African Law Division
Law Library, Library of Congress
June 1976

A-212

INTER-OFFICE MEMORANDUM

March 30, 1981

To: R.H. Edwards

From: H.G. Carpenter

Subject: Visit to London with Ross Saxon, Chairman of Nautilus Environmentals, Inc. and separate conferences with Benson H. Akindele and Alhaji A. Ringim

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As I had done with Bob Ruppert, I felt that it would be important to keep Ross Saxon fully informed in these negotiations. Because of its highly technical nature, both Saxon and Ruppert will probably have to visit Nigeria again, and will have detailed conferences with the customer. Therefore, we must presume that there will be full disclosure, especially since we met Akindele through Bob Ruppert.

Ross Saxon was very helpful, and he suggested that Kirkpatrick work on no less than a 15% markup from the manufacturers' prices, and that additionally Nautilus had included a further 3% in the NEI portion of $5,144,903, which was the price he brought with him for this trip. This was encouraging since Ruppert had told me he thought that Kirkpatrick should add on 20% — therefore, both manufacturers are not trying to squeeze us in any way and are giving us complete support.

At the first meeting with Benson Akindele, we spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.

We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 (actually Ross and I had worked up an FAS packed for export quotation from all three manufacturers of $6,543,655, and then had added a 15% margin for Kirkpatrick of $981,548, which comes to $7,525,203. Please bear in mind that the Kirkpatrick margin should be increased by an additional $154,347, which was the 3% included by NEI as described above). We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".

We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.

Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele has called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna [?]

At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their

profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously, he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th, at 9 P.M. to talk it over.

When we got back to our hotel, called Akindele, and left this information with him, he then advised me that he was reticent about bringing Ringim into the act too soon. He stated that this was really his deal, and that he had to do all of the preliminary work through various technical levels up through the Department of Defense and at that time he would call on Ringim. I told him that this was a matter of judgment but that I thought we must coordinate with Ringim and not let him have the feeling that he might be leaving him out. Obviously, I am not sure what Akindele is going to do here. He agrees that Ringim will be necessary at some point, but is wary of getting him involved too quickly.

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that he would be in touch with Ken Kunzman, and that the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and assistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

I told him that I did not think we would have problems with 1 and 2 above, but that we would have problems with what he next brought forward. Mr. Tesler said that it would be necessary that the commissions paid out would include more than the pro rata share that we would receive on advance payments. In fact, Mr. Akindele was requesting that Kirkpatrick provide $50,000 for advance expenses, and that "you should consider this as an investment". I told him that we had never ever taken action of this type and doubted very much that our Board would authorize such expenditures in this case, regardless of the size of this contract. Tesler then said he was going to ask Kunzman that we provide promissory notes dated 3 months, 6 months, 9 months, and 12 months in advance for approximately the total amount due, which his customer could then discount.

Finally, Tesler said that they would request that we have a bank outside the U.S. guarantee our commitment. I informed both Tesler and Akindele that these requests were extraordinary and had never been presented to us before, and that it was highly unlikely that we would consider them favorably. In any event, we should be receiving a letter shortly from Jeffrey Tesler outlining their terms for this agreement.

In my final conversation with Akindele, he pointed out his problems in Nigeria. He said he had to go back and deal with all of the principals, and assure them that he had created a solid arrangement with Kirkpatrick to insure that their ambitions would be met, and that this was the reason for these various specifications that Mr. Tesler had outlined to me. I in turn told him that we had been in business since 1946 and had not existed and prospered this long if we had been going around the world "screwing" people, and that it was probable that they were going to have to entertain this agreement based on our past reputation.

I think this project can be worked out, but like everything else, it is delicate.

H. G. Carpenter

HGC/jz

A-217

Confidential

INTER-OFFICE MEMORANDUM

March 8, 1982

To: R. Edwards
J. Krankel

From: H. G. Carpenter

Subject: Visit with Alhaji Ringim - March 5, 1982

Had a good visit with Alhaji Ringim today. He is an honorable person and came out here to update the aeromedical project in Nigeria as far as his commission was concerned. He said he would appreciate it if I would give him a letter which he could show to his friends in the Air Force, confirming that he was to get a commission that he could reimburse them. He went on to say that it was not so much that he wanted to get a commission for himself, but that he did have these air force leaders that he had approached in our behalf. He mentioned Air Vice Marshal Bello, the Commander in Chief of the Air Force, Air Commodore Imman and Air Commodore Yahayah, as well as Group Capt. or Air Cdre. Hamzeh, the air force commander in Kaduna.

He stated that after he had received a copy of our proposal in March of 1981, he had gone ahead and told these four men that he was involved in this project, that he wanted it to go through, and that they could count on his cooperation (otherwise, some commission). In his presence, he said Bello called Yahayah on the phone and told him that he was in favor of the thing and to proceed. Ringim said at this point he has absolutely nothing in hand which will allow him to have any confidence that he is going to participate in this program.

I told Ringim that I could not give him a letter since we had made a full commitment and appointment of Tunde from the beginning, and that his participation must come through that source. Ringim's reply was that he, therefore, felt it was definitely necessary for a meeting to take place between himself, Tunde and me so that there would be no misgivings or misunderstandings. He went on to say that he is going back to London this Sunday and will be there until the 14th, when he will go to Kano. From there, he will plan to be in Lagos on the 16th or 17th when the projected signing will take place. At that time he said he will work hard to make sure that the contact gets out of Defense and into Finance so that the letter of credit can be opened up immediately.

Because this is certainly going to become a problem in time, I decided to re-test my memory and put down exactly what I knew to be the facts since over one year has elapsed during the beginning of this project.

When Tunde insisted that Bob Ruppert come to Lagos in February of 1981, there is no question that he was the quarterback and originator of this project. When we got there, Ruppert and I had a long talk with Tunde one night, and told him that we wanted to be sure that he had the wherewithal to carry a project of this magnitude through the entire government. I explained our long association with Alhaji Ringim and the fact that he was a member of the Hausa party, and that it might very well be necessary for him to be involved in this program in order to make sure it got through. At that time Tunde had never had any experience of taking a project all the way through Defense. He explained that he felt he was only at the air force level and into Defense, but might need help at the top level of Defense and in getting it through the presidential arena.

I then suggested that it would be a good time to go and meet Alhaji Ringim. The first night we arrived, I had taken Bob Ruppert to meet Ringim since we were both staying at the Federal Palace Suites Hotel. Ruppert, of course, was very impressed with Ringim who is certainly a competent

performer. After Ruppert and I had our talk with Tunde, I then took Tunde with me and we visited Ringim together. At that time it was pointed out that the project was with Tunde, but that we might need assistance downstream. Ringim told Tunde that he should handle the project at the lower level but that he did have contacts at the highest levels of the Air Force, and then pointed out that it would be necessary as a Hausa to get the thing through the presidential office. No commitments were made but certainly there was no doubt that a relationship was implied, and I definitely recall it was left that Ringim told Tunde — you call me when the time comes. Ringim is of a higher station than Tunde, and that is always his modus operandi, anyway — telling people to call him.

Tunde from the beginning was nervous about Ringim since he was afraid that Ringim would require too big a piece of the action, but he did acknowledge that Ringim may be needed later on and that he certainly would utilize him. That is my exact impression of that initial conference, and Ruppert and I talked about the fact that Ringim certainly would be a valuable addition to the program when it got down to the final tough moments.

Subsequently, Ross Saxon and I went together to London in March of 1981 to present the full quotation. My memorandum of March 30th to Bob Edwards spells it out, but let me quote from the last paragraph of page 1:

> "We then told him (Akindele) that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project 'over the top'."

On page 2, let me again pick up my memorandum which was made at that time.

> "Ross and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus, and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. Benson Akindele had called Nigeria on Monday morning to get the approximate costs of unloading all of the material in Lagos and trucking it to Kaduna.
>
> "At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.
>
> "Ross and I then went to see Ringim at his flat in London, and left with him a copy of the quotation that we had typed up that afternoon, plus one of the big folders. Ringim assured us of his cooperation. Obviously he wanted to discuss the commission breakdown since he was thinking in terms of receiving some 10% of the commission, and asked that Akindele meet him in Lagos at his hotel Sunday night, March 29th, at 9 P.M. to talk it over.
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> "When we got back to our hotel, called Akindele, and left this information with him; he then advised me that he was reticent about

> bringing Ringim into the act too soon. He stated that this was really his deal, and that he had to do all of the preliminary work through various technical levels up through the Department of Defense and at that time he would call on Ringim. I told him that this was a matter of judgment but that I thought we must coordinate with Ringim and not let him have the feeling that he might be leaving him out. Obviously, I am not sure what Akindele is going to do here. He agrees that Ringim will be necessary at some point, but is wary of getting him involved too quickly."

Ross confirmed this afternoon that his recollection was that there was never a commitment given to Ringim as to the commission, but that it was implied that he would be included, and it was left that he was to discuss the matter with Akindele and, as usual, Ringim always left it that Akindele was to call him.

In September, when Ross and I were down negotiating the final contract, Ross recalls as we went through the stages of how much is the commission and the breakdown of it, that on more than one occasion I mentioned to him that Ringim must be taken care of and that Akindele acknowledged it, although there was never any specific amount mentioned. During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:

2 1/2 - for Akindele
5 - for air force
2 1/2 - medical group
5 - party
2 1/2 - minister himself
2 1/2 - other key defense personnel

It would seem that somewhere along the line we're going to have to sit down with Tunde and Ringim relative to the amount

for the air force. If there has been 5% included for the air force, we can't get sucked into the situation where both are claiming a need to make payment to air force personnel. I am only going through this situation in great detail because whether it is me or somebody else in the company, we have to have our facts in order and our recollection straight when this situation has to be finalized.

H. G. Carpenter

HGC/jz

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

This is not a case where there is not a victim. Shagari, who is the president of Nigeria at the time of this contract is now under house arrest. Some of these other individuals and I can name them if the Court is interested, are a very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names, and I think the reason for the enactment of the Foreign Corrupt Practices Act is in part because of the devastating political impact that payments on corruption has, and I think that is present in this case as well, on the Government.

The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be

given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 85-415

UNITED STATES OF AMERICA, :

v. :

Sentencing

W.S. KIRKPATRICK & CO., INC., :

:

Defendant.

January 6, 1986
Trenton, New Jersey

BEFORE:

THE HONORABLE JOSEPH RODRIGUEZ, U.S.D.J.

APPEARANCES:

THOMAS W. GREELISH, U.S. ATTORNEY
FOR THE DISTRICT OF NEW JERSEY,
BY: STEVEN LEVY, , A.U.S.A.,
For the Government.

SPENGLER, CARLSON, GUBAR, BRODSKY & FRISCHLING
BY: THOMAS H. SEAR, ESQ. (N.Y. Bar)
For the Defendant.

THE COURT: All right. We are here this afternoon for the court schedule of the sentencing of W. S. Kirkpatrick & Company. Are you ready?

MR. LEVY: Yes, your Honor, the United States is ready.

MR. SEAR: Yes.

THE COURT: May we have your appearances for the record?

MR. LEVY: For the United States, your Honor, my name is Steve Levy, L-e-v-y.

MR. SEAR: Your Honor, my name is Thomas H. Sear, and my associate here is Miss Rhonda Horn and Mr. Larry Horn, also has been involved in this matter, and as your Honor will recall, introduced me to the Court the last time, I believe.

THE COURT: Yes.

THE COURT: Mr. Sear, do you want to proceed?

MR. SEAR: Yes, your Honor.

I will attempt to be brief. I have made that promise in the past and not carried it through on, but I think I can do a better job of that this afternoon because we have attempted to put, to the best of our ability, all the information that we thought was relevant and necessary before the Court in our presentence memo.

And the two reasons for my standing up right now are, number one, if your Honor has any questions about any of the matters that we put forward or any other aspect of the case, I will be happy to respond to an inquiry by your Honor. And secondly, I just wanted to emphasize certain of the critical points that we think counsel for a lenient, fair, reasonable, merciful sentence in this matter.

And I suppose it seems a little bit strange talking about being merciful when you are dealing with a corporation which is a nonhuman entity, but I would suggest to your Honor that the real sentence that is going to take place here this afternoon is of the individuals, the people who are with W. S. Kirkpatrick & Company, Inc.

As we have indicated, since 1984, the status and the critical difficulties of the corporation have resulted in some 28 jobs being eliminated, but at present there are 28 individuals from the present chief executive on down who are attempting to turn this situation around, put this very tragic and troubling matter behind them, and in viewing them, I think it is absolutely critical that everyone understand that these individuals did not participate in what went on here. They didn't benefit from it. Indeed, the shareholders of this corporation have not taken any dividends or distributions in connection with this.

Besides the fact that the individuals who are at the corporation now were not involved in this matter, it was taken, the crime was really committed by an individual who not only is not there any more, but who was acting in complete contravention of the well-established clear policy of the corporation.

In addition, I know your Honor, in sentencing Mr. Carpenter, took into account all the facts and circumstances, including the nature of the offense here. Well, I don't, while I don't mean to excuse the conduct, I think we have all reviewed the facts in such manner and detail as to fairly indicate that we are not dealing with conduct that is as culpable as is involved in a number of other crimes.

I also want to make a very basic point that I think the Court ought to take into consideration, the extraordinary cooperation of the corporation here. I have been involved in law enforcement both as a prosecutor and as a private counsel for, I don't know, ten or eleven years, and I can't remember, at least and I don't think I was ever involved in a situation which an entity or a person took such a principled, responsible position.

In this case, when the company discovered the documents and it indicated a crime has been committed, not only did they produce them to the Government, but they isolated them out and specifically directed the Government's attention to those documents. I think it is fair to say that that act by the company resulted in Mr. Carpenter's determination to cooperate with the Government. Up until that point he had, as I understand it, completely professed his innocence. He certainly had done so to the company.

And I think that not only is important in terms of saying, well, the company cooperated, but it is concrete evidence of the fact that we have responsible, law-abiding people who are in control and who are running this company now, and who in a very difficult situation are trying to save the jobs of a bunch of people and go forward and conduct their business.

In that regard, I would finally say that any fine for this corporation would be a substantial one, under the financial situation and status of this company. A large fine will almost certainly put the company out of business, because given the numbers, given the performance, given the obligations of this company already, it makes absolutely no sense for it to continue if on top of the staggering losses and the incredible deficit, negative net worth that it now has, if a large fine is imposed on top of it, a large fine I might add, I can't see how the corporation could pay.

But those are the points that I wish to emphasize. I thank you for your time, your Honor, and again I reiterate if now we are, after Mr. Levy speaks, you have any questions, I would be happy to respond to you.

THE COURT: Thank you, Mr. Sears. Mr. Levy.

MR. LEVY: Thank you, your Honor.

Your Honor, let me preface my remarks by saying that I think that the Government, as well as the corporation, is very interested in seeing that the Court metes out a sentence which is

fair. I hadn't intended to really address the Court today, but I did receive a sentencing memo from Mr. Sear the other day which raises certain points that I believe need to be addressed. One of those points in the memo is that Harry carpenter acted alone.

Your Honor, the Government's investigation has revealed facts that are directly to the contrary of that position. The Government has evidence that Mr. Carpenter did not act alone, that Mr. Carpenter did act with the, he did act with the senior officers of the corporation; he did act the president; he did act with the vice president in charge of finance in bribing these Nigerian officials or in violating the Foreign Practices Act, which is the count which is charged in the information before the Court.

I can name the individuals form the Court if you would like, but the individuals, the president of the company, the vice president in charge of finance are both named in some — in the documents to which Mr. Sear referred, the interoffice company memoranda that were written by Harry Carpenter, discussed with them, given to them.

So I think it is pretty clear to the Government, your Honor, that Mr. Carpenter was not acting alone. He was acting in conjunction with the senior officers of the corporation. Mr. Carpenter was chairman of the board of directors, acting for the board of directors, so we feel that that contention that has been raised by the defendant that Mr. Carpenter was acting alone is not grounded in fact.

I might also say that there is some evidence from Mr. Carpenter that an official of the corporation which owns W. S. Kirkpatrick was involved intimately with the payment of this — this improper payment to this Nigerian national which is charged in the information. I can also name this individual for the Court. And I might say to the Court that this individual is not a United States national, he is a Syrian national, I believe. We have invited him to appear before the Grand Jury. We have attempted to elicit the cooperation of Mr. Sear in getting

him here, and I think that Mr. Sear has done all he can, but however, this individual has indicated that he is not going to appear without I think a grant of immunity which the Government is not going to give.

The next point that I would like to address, your Honor, is that there were no other instances by W. S. Kirkpatrick, violations of the Foreign Corrupt Practices Act. The Government is also in possession of the fact that there was another violation of that Act, the Foreign Corrupt Corporations Act by the corporation, and this is outside the statute of limitations, so therefore the Government has not elected to proceed on it.

Another point I would like to address is that no competitors of W. S. Kirkpatrick were excluded from bidding on the Nigerian contract. Your Honor, the Government is in possession of evidence which indicates that this is false, because William Mitchell, who is the president of Environmental Techtonics Corporation, a Pennsylvania corporation, was quite interested in bidding on this Nigerian contract. Mr. Carpenter, as well as others at W. S. Kirkpatrick were aware of this, and it appears from the evidence that we have that in fact Mr. Mitchell was excluded from bidding on this contract because of the improper conduct by Mr. Carpenter, the corporation and other senior officers at the corporation.

There was also made mention in Mr. Sears sentencing memorandum of no evidence of payment being actually made to these foreign officials. I should tell the Court, your Honor, that the Government has been for the last three-quarters of a year attempting to obtain the permission of the Government of Luxembourg, in order to penetrate their bank secrecy laws, in order to get the necessary documents from the banks in Luxembourg.

The State Department has been helping with this, and as I understand it, that information may soon be forthcoming in this year. So it is not a question of the evidence not existing, it is

just a matter of following the protocols with the Government of Luxembourg and with the State Department in order for them to give us something which they ordinarily would not do.

The next thing I would like to say about this case, your Honor, is that there has been made mention of the fact that no present employees of the company are accountable for the situation at hand. I would agree with that except for the fact that one of the individuals who is now in a very prominent position is still at the corporation. This individual is current, has been sent the target letter by the Department of Justice advising him that he is a target of a Grand Jury investigation, that the Government is contemplating indictment. And so I would say to the Court that except for this one individual, Mr. Sear's statement is true, there are no employees here who were responsible for, but this individual who directly authorized the payments to this Nigerian note in violation of the Foreign Corrupt Practices Act, your Honor, is still there.

Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated. In reading Mr. Sear's sentencing memorandum, your Honor, I got the impression that Foreign Corrupt Practices Act is somehow not effective or maybe somehow not needed, but I can say that the government of Nigeria as well as the State Department have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain evidence about who possibly received the payments which are set forth in the memoranda that Mr. Carpenter wrote to other senior officers of the corporation.

I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State department has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.

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The Government is interested in, without calling for a specific figure, the Government is interested in a fine that would send a clear signal to the business community, in New Jersey and else where, that the Foreign Corrupt Practices Act is important and that the purposes which led to the enactment of the Foreign Corrupt Practices Act are very valid and to be given weight and that this type of conduct will not be permitted in the business community.

Now, that is all I have, your Honor.

THE COURT: Thank you. Mr. Sear, is there a response?

MR. SEAR: Yes. Certain of the points made by Mr. Levy, I can't really respond to because he is indicating he has received the information that we have never been made privy to and we don't know anything about, and if he has got it, he has got it, and if he doesn't, he doesn't. I don't think those sort of general observations provide the proper basis for determining what fine ought to be given to Kirkpatrick.

Secondly, with respect to the situation in Nigeria, I don't think that again, present political situation, what has happened there, is also a highly relevant fact that ought to be given a lot of weight.

The one thing that concerns me the most is, though, and I do want to respond to, and that is the notion that other individuals at the company, one of whom is still there, acted

along with Mr. Carpenter. I mean, the memorandum that I gave to Mr. Levy back in November, that I have referred to, they show that Mr. Crankle was a recipient. But I know Mr. Carpenter has, both through his lawyers and directly to me, told me that he acted alone. And it is my understanding that is what he has told the Government and I know the Government indicated that Mr. Carpenter had cooperated fully and had been truthful with him.

Indeed, Mr. Levy and his then supervisor and I had a conversation almost a year — well, over a year ago, I guess, in which we discussed the situation with respect to Mr. Crankle, because it was brought up, the fact that he is still with the company and he is indicated as a recipient of this memo. My position then was, look, we are going to act responsibly. We are not going to go out and fire somebody to help us in connection with an investigation. But if we learn of evidence that somebody was involved in a crime, participated in a crime, we will take appropriate action, but to this date, all that we have heard and been told is that he is shown as a recipient on the memo.

It is my understanding Mr. Carpenter has simply said, Mr. Crankle got this memo, that is about it, that is all I can tell you. Again, this is somebody who the Government said to your Honor had been truthful and candid. Now, the point I am — all I am really making here is that the fairly construed, no matter how you say whose name is on the memo or whatever, this was an individual act by one person. I mean, I have enormous sympathy for Mr. Carpenter. The situation that he found himself in, and I think he truly was trying to do good for the company as well as himself but this is not a situation where you have a bunch of people at the company and you have corporate policy, you have a truly corporate act that demands some stern response. It is a situation in which one man committed a crime and because of the theory of vicarious responsibility, the company is responsive.

So I think the Court ought to take that sort of reality in account, and unless you have any questions, I have no further comments at this time.

THE COURT: No, I have no further questions. Mr. Levy.

MR. LEVY: Yes, your Honor

THE COURT: I want to be sure I do hear out both counsel.

MR. LEVY: All right. Mr. Carpenter has made a series of approximately four, perhaps five proffers to the Government in which he completely details his involvement from beginning to end with this Nigerian contract and the improper payments to Ackendelli, and during the course of this, he describes the circumstances that led him to writing these memos.

Well, the reason that he wrote the memos is because he wanted these two individuals that are named on these documents to be completely aware of everything that was happening in the event that he was to leave the corporation, which he was going to do in January of 1983. He fully discussed it with these two individuals. They lived this on a day-to-day basis. That is the reason he wrote it. He was not acting alone. He was acting, I must admit he was acting for the benefit of himself, but he was also acting for the benefit of the corporation because he knew that the corporation needed that contract, that 10.8 million dollars contract.

When I read Mr. Sear's memo that the corporation did not profit, I was absolutely flabbergasted. To give the company a million dollars, for them to conduct their business operations for them to meet — to have the funds necessary to meet their day-to-day survival is an absolute benefit, in the eyes of the Government. And that is why we told the probation officer that any that any fine in terms of the Government's case must be considered substantial when measured against that

approximately 1 million dollars profit. Thank you, your Honor.

THE COURT: I guess one of the more difficult things in this case is the fact that we are dealing with a corporation, and sometimes it is like punching a bag of smoke. You kind of wonder where the real damage is done by the actions against the corporation. Many times, frankly, innocent people can suffer. And I respect that argument that is made by Mr. Sear. I do note that I have a document before me that does indicate that, with respect to the presentence report, that W. S. Kirkpatrick & Company has fully reviewed it and they have made their comments with respect to that report in their presentencing memorandum.

That was executed today, January 6, 1986.

There are a couple of things that I think are worthy of some comment, and as I say, it is not an easy matter to try to establish what should be the real deterrent in this case. But I am somewhat influenced by the fact that the corporation, and it doesn't seem to be much dispute, did take the initiative to whatever degree, in cooperating with the Justice Department once it was known that they were, or that Mr. Carpenter was somewhat involved in violation of this act, and this Foreign Corrupt Practices Act, as indicated in the presentencing memo. Apparently counsel for the corporation went to Washington and actually hand-delivered certain key documents which perhaps would have been found in any event, but made the search a lot easier. There is indication that the corporation has a policy and the policy is one where naturally it would indicate that it doesn't condone any violation of the foreign corrupt Practice Act.

The corporation further indicates that their profit margin before they entered into this situation was set before the total involvement with the corruption in Nigeria. I guess the indication there being that the profit was certain, certainly not expanded but what had to be build into it was this payment in order to facilitate the granting of the contract. All in all, it

doesn't indicate the purest of intention on the part of the corporation. The corporation is in fact involved.

But then it comes to the matter of imposing a fine. The presentencing memorandum itself filled with indications and the letters that I have received from the actual employees of the corporation indicating that there is really no ability of the corporation to pay, that they haven't paid dividends since 1978, I believe it was, that the real victims here would be the lower level employees who would suffer because the corporation would actually respond by making funds available, taking them away from those who perhaps are most innocent, and I think that is the perplexing part of this kind of a sentencing, when you seem to want to move against a small corporation, small in that the victim is more identifiable as being the lower level employee, as against Mr. Carpenter who in order to achieve his bonus could very well have been stimulated into acting personally but we can't say that that action only went to Mr. Carpenter.

Actually, the corporation simply by benefit of obtaining the contract benefited through the profit to some degree. And I can't completely ignore the fact, although it is absolutely no excuse, that corruption is a way of life from the record before me in Nigeria, and I think that is one of the most disturbing facts that I confront, because when you do look at corruption being a way of life, you have to realize that the victims, the ultimate victims of that corruption are the poor souls in Nigeria who certainly are suffering enough, but who become greater victims at the hands of those who corrupt in the name of their government, and yet they are out of the reach of this Court, and I think that is where the real danger lies.

Mr. Levy makes a point that the corporation knew and that seems to be refuted. I think for the purposes of this sentencing, that I don't have to go beyond what was capable of proof in any event, because I think if there are those who knew, who are still there, they should be the real persons to respond for the damage that they have created because they can be subject to punishment as individuals, that there were no

other violations that they occurred outside the statute of limitations.

I have no proof before me to know how to measure that and I didn't consider that in the sentencing, that a competitor suffered. Again, there is no real proof against the corporation after their plea to know how to measure some of the allegations, although they are there, and again, I give no real weight to that factor in the sentencing. That their are efforts to reach the foreign bank accounts, I can appreciate that that is occurring and should occur, but again, I have no way of measuring that fact from our records at this sentencing, and that there are present employees who are targets, perhaps, or being pursued by the Government, people still in existence in the corporation, I think that is perhaps where the investigation should go, and for my purposes this afternoon, that information should not play any part in the sentencing here because I am bound in fairness by the record that is before me.

I have no hesitation in saying those who authorized or participated in should be the real targets of the Government's investigation. We are now left, however, with the corporation. How do you deal in fairness with a corporation that is small and says that the real victims are going to be those who did not participate in it, the lower level employees? The corporation that says it really can't afford to pay, that any substantial fine would drive them out of existence, almost like a death sentence to a corporation.

And being a human being, and you try to measure these things, it is not an easy matter to measure because you do have a certain amount of feeling, and one feeling is that I totally respect the passage of the Foreign Corrupt Practices Act because I think that if the Government is ever going to give a signal as to what fair dealing is, it has to do it, this is one way of doing it and that act must be respected.

So that we indicate that it is a way of life in other nations, it can't be a way of functioning by citizens of this nation, and I think that is the way we started, indicating what the ideals to

which we are dedicated really mean, and that is by living them here, so that even though it is a new act and we don't have a lot of experience as to how to sentence corporations under it, it is an act which nevertheless must be fully recognized and allayed.

The next question is how do you balance that? Whatever signal should be given to the corporations of the United States in saying that that act will be followed, and I think in doing it with some balance and some fairness with those who are actually before the Court now, I think the $10,000 requested by counsel is certainly not sufficient to indicate that this kind of activity will not be condoned. I think the measurement has to be one where the amount has to be substantial as applied to this corporation, where the amount of the fine should certainly not be taken as precedent against any other individual corporation because I hope it is a measurement of what should be the fine to this corporation, taking all of the circumstances before me, by giving full consideration to all the circumstances presently before me.

The fine that this Court feels should be imposed, under the circumstances of this case, is a fine of $75,000 to be payable within an arrangement with the probation office over the period of five years. That is certainly not the $10,000 requested by counsel. It is certainly not a figure that I think is totally punitive to the extent of playing partially against the innocent victims of that corporation, but I hope it is one that because this is a new area of the law and we don't have a lot of precedent to measure, that does sound the signal to say perhaps this is a learning process. Violation of this act will not be condoned and if lessons are not learned, perhaps the fines will have to be stiffer in the future.

Under the circumstances, gentlemen, I think a sentence in this case would be $75,000 payable by W. S. Kirkpatrick & Company over a period of five years. That arrangement to be worked out by the Probation Department. Is there anything further?

MR. LEVY: The Government has nothing further, your Honor.

MR. SEAR: No, your Honor, other than to say it has been a pleasure and a privilege to be before you.

THE COURT: Thank you.

MR. HORN: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

PLAINTIFF'S RESPONSE TO SUGGESTION OF SUMMARY JUDGMENT AND PLAINTIFF'S RULE 56(f) AFFIDAVIT

In a conference call of August 20, 1986 between the Court and all counsel, the Court posed ten questions and indicated its intention to consider some or all of the pending Motions to Dismiss as Motions for Summary Judgment. On or about August 27, 1986, counsel for Plaintiff and counsel for W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), and DIC (Holding), Inc. ("DIC"), tendered the requested submissions. It is the position of Plaintiff that, at this early juncture, the depositions, Answers to Interrogatories and the Affidavit of Carpenter show that there are genuine issues as to material facts and Movants are, therefore, not entitled to judgment in their favor as a matter of law pursuant to Rule 56, F.R.Civ.P.

Plaintiff's specific responses to Kirkpatrick's Answers to the Court's questions are discussed, in detail, below. In summary, Plaintiff urges that the Court should rule on the pending appeal from Magistrate Hedges' Order concerning Carpenter's Fifth Amendment claim and should allow discovery so that the necessary facts may be ascertained and so that this Court will thereafter be in a position to rule on the pending Motions to Dismiss.

QUESTION 1:

Is there any law in Nigeria concerning bribery and public officials with regard to public contracts?

PLAINTIFF'S REPLY:

Both Plaintiff and Defendants appear to agree that the allegations contained in the Complaint would constitute a violation of one or more Nigerian criminal statutes concerning bribery. This Court is entitled to take judicial notice of this foreign law pursuant to Rule 44.1, F.R.Civ.P.

QUESTION 2:

Did Nigeria compel the payment of the bribe under penalty of loss of the contract?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 2:

Kirkpatrick's knowledge on this subject is derived from two memoranda, which are attached hereto as Exhibits B and C. These memoranda establish that Mr. Akindele advised Kirkpatrick that the Nigerian government, as a matter of course, required payments as bribes to be made by any company that is awarded a Nigerian government contract. Specifically, the March 30, 1981 memorandum, which is attached as Exhibit B, states that Mr. Akindele's attorney advised Kirkpatrick that such payments are "required and asked for by the customers." Further, the memoranda make clear that Mr. Akindele advised Kirkpatrick that it would not have been awarded the contract unless it paid money to Nigerian officials and/or representatives. For example, according to the March 30, 1981 memorandum, Mr. Akindele, in advising Kirkpatrick to pay a bribe, "reviewed in great detail *the habit of Nigeria and the expectations of many*, and stated that we *must* think in terms of a 20% margin . . . to put the project 'over the top' (emphasis supplied)." (Defendants' Response at pp. 7-8)

PLAINTIFF'S REPLY:

Plaintiff does not accept Kirkpatrick's unsworn suggestion that Nigerian government officials, as a matter of course, required bribe payments for government contract business. Rather, in order to ascertain the true facts, if relevant, Plaintiff desires to take the deposition of Defendant Carpenter, which deposition is currently unavailable due to the Order of Magistrate Hedges sustaining Carpenter's claim of privilege. This ruling is currently before this Court via Plaintiff's Notice of Appeal, which appeal should be ruled upon at this juncture. Further, the depositions of Akindele and other knowledgeable persons may be necessary.

QUESTION 3:

Has Nigeria been informed and, if so, how, when and by whom of the bribery?

DEFENDANTS' RESPONSE TO QUESTION 3:

Kirkpatrick contends that the Republic of Nigeria has been informed of the bribery.

PLAINTIFF'S REPLY:

Plaintiff agrees that the Republic of Nigeria has been informed of the bribery pursuant to the July 31, 1986 letter from Plaintiff's counsel to the Nigerian Ambassador to the United States, a copy of which was previously submitted to the Court as Exhibit "B".

QUESTION 4:

Has Nigeria sought legal redress against its governmental representatives or anybody else receiving the bribes and/or any defendants is this case?

DEFENDANT'S RESPONSE TO QUESTION 4:

Kirkpatrick and DIC contend that neither have been the subject of an attempt at legal redress at the behest of the Republic of Nigeria. Kirkpatrick contends that Carpenter has been advised that legal redress has been threatened against him (Carpenter).

PLAINTIFF'S REPLY:

Plaintiff has no information concerning whether the Republic of Nigeria has sought legal redress against either Kirkpatrick or DIC. The deposition of Carpenter, currently before this Court as an Exhibit to the pending Notice of Appeal, makes clear that Carpenter has no information to the effect that the Republic of Nigeria has sought redress against him but rather Carpenter has some information, hearsay in nature, which is to the effect that the Republic of Nigeria would like to *question* Mr. Carpenter concerning this situation.

QUESTION 5:

Who are the medical group, the party and the minister (as set forth in paragraph 35 of the Amended Complaint)?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 5:

"The knowledge of the defendants who prepared this submission regarding these names is derived from the memorandum dated March 8, 1982, which is attached as Exhibit C. Regarding those names, the memorandum states:

> During that September visit, Akindele gave me a breakdown of what the overall 20% commission would constitute. It came down to the following:
>
> 2 1/2 - for Akindele
> 5 - for air force
> 2 1/2 - medical group

5 - party
2 1/2 - minister himself
2 1/2 - other key defense personnel

Litigation and resolution of this action, of course, would require inquiry into the identities and actions of the above-listed individuals and entitles. Under the circumstances, since it is the plaintiff who sets forth allegations regarding these individuals and entities in the Amended Complaint, the plaintiff is the party best suited to provide the information the Court seeks." Defendants' Response at pp. 11-12.

PLAINTIFF'S REPLY:

Kirkpatrick and DIC suggest, but do not state either by Affidavit or otherwise, that their sole knowledge concerning this question is derived from the March 8, 1982 memorandum, Exhibit C to their submission. Defendants, as bribe conspirators, without affording Plaintiff any discovery, suggest that Plaintiff is the "party best suited" to supply the requested information.

In order to obtain the pertinent information for submission to this Court, Plaintiff requires discovery. First, Plaintiff must take the deposition of Carpenter and, accordingly, it is therefore necessary that this Court determine the presently pending Appeal. Second, Plaintiff will need to attempt to obtain information from one or more banks concerning banking transactions evidencing payments in the form of bribes to one or more of the individuals identified in the March 8, 1982 Kirkpatrick memorandum. Depending upon the availability of this banking information, Plaintiff may need to depose one or more former Nigerian officials or other persons with respect to this subject. Finally, Plaintiff may need to take the deposition of Defendant Akindele who is one of the people in a position to provide the pertinent information.

QUESTION 6:

Has the contract been completed? Have all obligations been performed under the contract? Have the goods and supplies been delivered? Has the base been constructed?

DEFENDANTS' RESPONSE TO QUESTION 6:

"Kirkpatrick has completed 95% of its obligations pursuant to the contract. It had not completed the remaining 5% of its obligations by the time the criminal investigation commenced. Kirkpatrick did not perform any services on the contract following commencement of the criminal investigation and has no intention of doing so at any time. Kirkpatrick believes that Nautilus Enviromedicals Systems, Inc., one of the subcontractors on the original contract, has arranged with the government of Nigeria to complete the contract and is currently in the process of doing so." (footnote omitted)
Defendants' Response at 12.

PLAINTIFF'S REPLY:

None of the "facts" set forth in the foregoing Response are supported by any Affidavit. Plaintiff desires to take one or more depositions of Kirkpatrick representatives concerning the alleged facts set forth in the Defendants' Response. (For example, why does Kirkpatrick have "no intention" of completing the contract for which it was apparently paid by the Republic of Nigeria?)

QUESTION 7:

Has Nigeria done anything in light of the contract and the allegations in this case and, if so, what and when? Has the Nigerian government challenged in any way the contract or the parties to the contract?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 7:

Defendants urge that this question is answered by virtue of the fact that no formal legal redress has been sought against either Kirkpatrick or DIC.

PLAINTIFF'S REPLY:

Although Plaintiff has no knowledge concerning this matter, it seems likely that in light of the suggestions contained in Kirkpatrick's Response to Question 6 which are to the effect that Kirkpatrick has not completed the contract, one or more representatives of the Republic of Nigeria have had discussions with one or more Kirkpatrick representatives concerning this subject. In order to obtain the necessary facts for submission to the Court, Plaintiff requires the deposition testimony of one or more Kirkpatrick representatives concerning the information sought by the Court's question.

QUESTION 8:

Are there any internationally accepted standards concerning bribery under situations with regard to this case?

DEFENDANTS' FACTUAL RESPONSE TO QUESTION 8:

Defendants' response to this question is that bribery of government officials is expressly prohibited throughout the world. Defendants also suggest that "pursuit of this action would invariably prove humiliating to the Government of Nigeria since, if plaintiff's allegations are true, it would involve the Nigerian government publicly in actions which are internationally recognized as disgraceful." Kirkpatrick Response at p. 16.

PLAINTIFF'S REPLY:

To the extent that this suggestion constitutes an allegation of fact, it is not supported by any Affidavit and is subject to serious question. To the extent that responding Defendants wish to urge this "fact" upon the Court, some method of proof other than pure argument is required.

QUESTION 9:

Who initiated the concept of the bribe, the defendants or the Nigerians?

DEFENDANT'S FACTUAL RESPONSE TO QUESTION 9:

"Mr. Akindele initiated the concept to Kirkpatrick. Based on Mr. Akindele's statements, Kirkpatrick believes that officials and/or other representatives of the Nigerian government initiated the concept to Mr. Akindele by making it clear to him that they would not consider any bid for the contract unless a commission was distributed to them." Defendants' Response at 17.

PLAINTIFF'S REPLY:

There is no proper and admissible evidence of record to support Defendants' contention that Defendant Akindele initiated the bribe discussions with Kirkpatrick. In order to ascertain the true facts surrounding this situation, it is necessary that Plaintiff take the deposition of Defendant Carpenter and thus it is appropriate for this Court to rule upon Plaintiff's appeal from Magistrate Hedges' Order sustaining Carpenter's claim of privilege. Further, Akindele's deposition may be necessary in order to further explore these same facts.

QUESTION 10:

Is this type of pleading (specifically with regard to the allegations set forth in Paragraph 57 of the Amended Complaint) legally sufficient under the RICO setting?

SUMMARY OF DEFENDANTS' RESPONSE TO QUESTION 10:

Kirkpatrick and DIC argue that the Amended Complaint fails to state a claim upon which relief can be granted by virtue of the absence of proper "pattern" allegations. Defendants present additional legal argument concerning the "pattern" requirement.

PLAINTIFF'S REPLY:

The language of paragraph 7 of Plaintiff's Amended Complaint is not "boilerplate" language and does have a factual basis. Accordingly, neither a Rule 12(b)(6) dismissal nor a Rule 56 summary judgment is appropriate.

First, Prosecutor Levy, at the sentencing of Kirkpatrick, stated in open Court to sentencing Judge Rodriquez, that Kirkpatrick engaged in "another violation of the Act, the Foreign Corrupt [Practices] Act...." (Kirkpatrick Sentencing Transcript, Exhibit "E" to Defendant's Response, at p. 7.)

Secondly, the March 8, 1982 Kirkpatrick inter-office memorandum, Exhibit "C" to the Defendant's Response, at p. 2, suggests that Kirkpatrick had previously engaged in bribery in order to obtain sales contracts. In order to understand the basis for this contention, a very brief review of certain pertinent facts is necessary. It appears from the facts developed in the criminal proceeding and from the facts set forth in the two Kirkpatrick memoranda that Kirkpatrick's primary bribe activities in connection with the instant contract were conducted through Defendant Akindele. However, the text of these memoranda also suggest that Akindele's bribe connections may have stopped short of the very highest levels

of the government of the Republic of Nigeria. Apparently Kirkpatrick believed that in order to finally complete the contract and payment arrangements with the Republic of Nigeria, the intercession of yet another bribe intermediary may have been necessary. The individual who was to be involved in the highest level of bribery was Alhaji Ringim. Apparently Carpenter felt that Kirkpatrick might be required to pay even more bribes than it had agreed to (20%) and was therefore very interested in coordinating the efforts of the two agents being used to pay bribes on behalf of Kirkpatrick, Akindele and Ringim.

Thus, in the March 8, 1982 memorandum, in purporting to recite a conversation between Carpenter and Akindele, Carpenter states:

> " I [Carpenter] explained [to Akindele] our [Kirkpatrick's] long association with Alhaji Ringim and the fact that he was a member of the Hausa party, and that it might very well be necessary for him [Ringim] to be involved in this program in order to make sure it got through." (March 8, 1982 Memorandum at p. 2.)

A fair reading of this memorandum suggests that Ringim and Kirkpatrick were involved in prior bribery escapades. The details of these prior escapades — *i.e.*, the "long association"— are currently unknown to Plaintiff.

Plaintiff requires the Carpenter deposition in order to fully explore these facts. Additional discovery will also be necessary. However, at this juncture, it is clear that Kirkpatrick has not shown through undisputed facts that it is entitled to judgment as a matter of law in its favor based upon the absence of a "pattern" of racketeering activity.

CONCLUSION:

This Court's suggestion that it would prefer to entertain the presently pending Motions to Dismiss on the basis of Rule 56 was an excellent suggestion. However, because of the early

stage of this case, there are not undisputed facts of record which would permit the entry of summary judgment in favor of either Plaintiff or Defendants.

Plaintiff's right to engage in additional discovery pertinent to the pending Motions is severely circumscribed by virtue of two court Orders. The earlier of these Orders is dated May 30, 1986 and provides, at paragraph 4, that "Defendants shall not be required to provide any further discovery pending disposition of the previously filed Motions to Dismiss."[1] (A copy of this Order is submitted herewith for the convenience of the Court.) This Order was not received by Plaintiff's counsel until after the ten day period for appeal therefrom had already expired and, accordingly, no appeal from this Order was initially pursued.

Plaintiff will soon file a Motion to extend the time for appealing Magistrate Hedges' May 30, 1986 Order to the extent that such Order stayed discovery and appeal that Order to this Court.

The second Order which effectively precludes necessary discovery is the July 17, 1986 Order of Magistrate Hedges which sustains Carpenter's assertion of a Fifth Amendment privilege. This Order is the subject of a pending Notice of Appeal which is currently before this Court.

Plaintiff believes, based upon the statements of Assistant United States Attorney Levy at the Kirkpatrick sentencing proceeding, that additional evidence pertinent to this civil action is in existence but is unavailable due to the secrecy provisions surrounding federal grand jury investigations (Rule 6(e), F.R.Civ.P.). Accordingly, within the very near future, Plaintiff will file an appropriate Motion seeking disclosure of the pertinent grand jury materials, which materials will be

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1 At paragraphs 2 and 3 of that same Order, the Magistrate also circumscribed Plaintiff's right to discovery from Carpenter (¶2) and Kirkpatrick and DIC (¶3).

submitted to the Court in connection with the pending Motions, if appropriate.

Finally, pursuant to Rule 56(f), Federal Rules of Civil Procedure, Plaintiff's counsel, by his Affidavit appended hereto and submitted contemporaneously herewith, hereby certifies that the factual allegations concerning the absence of necessary discovery information contained in the present Response explain why Plaintiff is unable to provide additional factual materials, in the form of Affidavits or otherwise, to the Court at this early juncture so as to permit a proper Rule 56 summary judgement disposition.

Respectfully submitted,
RUTTER, TURNER & STEIN

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

RULE 56 AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADELPHIA :

ALAN A. TURNER, ESQUIRE, being duly sworn, does hereby depose and state as follows:

1. I am one of the attorneys representing Plaintiff Environmental Tectonics Corporation, International, in this civil action.

2. The facts set forth in the foregoing Response of Plaintiff's Response To Suggestion Of Summary Judgment and Plaintiff's Rule 56(f) Affidavit concerning the present unavailability of discovery information are true and correct to the best of my knowledge, information and belief.

3. Because of the present unavailability of factual information which may be necessary to this Court's disposition of a Rule 56 Motion for Summary Judgment, this Court is requested to refuse the Application for Summary Judgment or, alternatively, is requested to order a continuance of this pending Motion for Summary Judgment so as to permit the necessary discovery to be accomplished and submitted to the Court.

The foregoing facts are true and correct to the best of my knowledge, information and belief.

_____
ALAN A. TURNER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9TH DAY OF
SEPT. A.D., 1986.

_____
Notary Public

MY COMMISSION EXPIRES:

SPENGLER CARLSON GUBAR BRODSKY
& FRISCHLING
Attorneys for Defendants
W.S. Kirkpatrick & Co., Inc.
Development Industrial Corporation
and DIC (Holding) Inc.
280 Park Avenue
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ENVIRONMENTAL TECTONICS CORPORATION INTERNATIONAL	:	IN THE UNITED
	:	STATES
-against-	:	DISTRICT
	:	COURT FOR
W.S. KIRKPATRICK INC., DEVELOPMENT INTERNATIONAL CORPORATION, DIC (HOLDING) INC., IDC INTERNATIONAL S.A. LUXEMBOURG HARRY G. CARPENTER and BENSON "TUNDE" AKINDELE	:	THE DISTRICT OF NEW JERSEY
	:	
	:	Civil Action No. 86-796HJS

ORDER

And now this 30th day of May, 1986, a status conference having been held on May 27, 1986 before the Honorable Ronald J. Hedges in the presence of Thomas H. Sear, Rhonda D. Orin, Lawrence S. Horn, Kelley Newton and Alan Turner, it is hereby ordered that:

1. Thomas H. Sear and Rhonda D. Orin are admitted *pro hac vice* in this case and appropriate affidavits shall be filed forthwith.

2. Defendant Harry G. Carpenter shall be deposed within 14 days of May 27, 1986. Said deposition shall be limited to

questions concerning documents prepared or maintained by defendant W.S. Kirkpatrick & Co., Inc. (erroneously named in the Complaint as "W.S. Kirkpatrick, Inc." and referred to hereinafter as "Kirkpatrick"), and questions asked in the first two sets of interrogatories directed to Kirkpatrick, and the first set of interrogatories directed to Mr. Carpenter. Said deposition shall be conducted in Mr. Carpenter's attorneys' offices in Roseland, New Jersey.

3. Of the outstanding discovery requests directed to Defendants W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") Development Industrial Corporation (erroneously named in the Complaint as "Development International Corporation" and referred to hereinafter as "DIC") and D.I.C. (Holding) Inc. ("Holding"), Kirkpatrick, DIC and Holding shall only answer those questions in the first set of interrogatories directed to them regarding the corporate relationship among Kirkpatrick, DIC and Holding.

4. Defendants shall not be required to provide any further discovery pending disposition of the previously filed Motions To Dismiss.

5. The time within which Plaintiff Environmental Tectonics Corporation, International may either file its Amended Complaint adding or deleting parties and purporting to meet the defects alleged in the Motions to Dismiss, or, alternatively, file its Responses to the pending Motions to Dismiss filed by such Defendants, is hereby extended from May 26, 1986 to and including June 13, 1986.

6. The next status conference in the above-captioned action will be held at 9 o'clock on July 18, 1986.

_____

HEDGES, U.S. MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL	)	Civil Action No. 86-796HJS
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*	)	

CERTIFICATE OF SERVICE

ALAN TURNER, ESQUIRE, hereby certifies that a copy of the within Plaintiff's Response To Suggestion Of Summary Judgment And Plaintiff's Rule 56(f) Affidavit were served upon the following persons by placing a copy of same in the United States Mail, postage prepaid, on Tuesday, September 9, 1986:

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By_____
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September 12, 1986

The Honorable Alfred J. Lechner, Jr.
United States District Court
for the District of New Jersey
U.S. Courthouse & Post Office Building
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation v.
W.S. Kirkpatrick & Co., Inc., et al.
Civil Action No. 86-796HJS

Dear Judge Lechner:

We have just received "Plaintiff's Response to Suggestion of Summary Judgment and Plaintiff's Rule 56(f) Affidavit" which apparently is intended to supplement plaintiff's earlier responses to the questions posed in counsel's telephone conference with Your Honor of August 20, 1986 and to reply to the responses of defendants W.S. Kirkpatrick & Co., Inc. and DIC (Holding), Inc.

Although I was strongly tempted to file with Your Honor a reply that dealt with each of plaintiff's arguments point by point, upon consideration my judgment was that our position is clearly set forth in our motion papers and our earlier responses to the Court's inquiries and that no such reply was necessary or appropriate.

Nonetheless, two fundamental points deserve emphasis, particularly because of the claim now raised by plaintiff that a supposed need for additional discovery requires a denial or deferral of the pending motions to dismiss.

First of all, Your Honor made it explicitly clear that the questions you were posing in the conference were focused on the Act of State basis for the motions (See page 3 of the transcript of the August 20, 1986 proceeding). Thus, it is our understanding that the treatment of the motions to dismiss as motions for summary judgment, occasioned by the request for a few specific factual submissions, was limited to that issue. Accordingly, plaintiff's claim that it needs additional, broad discovery before a motion for summary judgment can be properly considered misses the mark since even plaintiff does not claim that additional discovery is necessary on the Act of State issue. In fact, given the responses of the parties to the Court's inquiries and the agreed-upon facts relating to the Act of State issue there is no need for any discovery to properly resolve that issue and that aspect to the motions to dismiss. Indeed, it is our position that the taking of discovery by plaintiff as alluded to in plaintiff's most recent filing, which would include deposing "one or more former Nigerian officials" and which would necessarily involve inquiring into the actions of the Nigerian government would by itself conflict with and violate the letter and spirit of the Act of State doctrine.

Secondly, after plaintiff has been provided with and taken advantage of the opportunity to amend its complaint, has had extensive discovery and examined over 50,000 documents produced by the defendants, and has filed numerous and sundry documents relating to the pending motions to dismiss, it still has failed to allege any facts which, if true, would establish that any defendant had been involved in a "pattern" of unlawful acts so as to be liable for a RICO violation. Instead of alleging such facts, plaintiff suggests that it is entitled to still additional discovery and that it will seek disclosure of certain grand jury materials. Plaintiff suggests that it may thereby obtain some facts to provide a factual basis for the suggestion that Kirkpatrick had previously engaged in some form of unspecified bribery involving some unspecified contract and some unspecified foreign country at some unspecified time.

Plaintiff's position that it has no obligation to set forth a factual basis for its claims now has no support under any

construction of the Federal Rules of Civil Procedure or any case interpreting the rules and counsel for plaintiff does not even purport to suggest any authority.

As discussed in our earlier response, since the *Sedima* decision, district courts throughout the country have not hesitated to dismiss racketeering claims because of a lack of a well-pleaded factual basis for the allegation that a defendant had engaged in a "pattern" of racketeering and there is no reason why this Court should hesitate to dismiss the RICO claims here for the same reason.

For all the reasons set forth in our earlier submissions in support of the motions to dismiss, defendants W.S. Kirkpatrick & Co., Inc. and DIC (Holding), Inc. urge that they be granted in all respects.

Respectfully submitted,

/s/ Thomas H. Sear

Thomas H. Sear

THS:jhp

cc: Alan Turner, Esq.
Theodore Wells, Esq.

THE COURT: What I'm saying is that for the plaintiff to prove its case, it seems to me, and I'm not as familiar with this case, I've just come on duty in July, but it seems to me there are going to have to be some proof to demonstrate that not only did Carpenter or others intend to have the bribe paid, but, in fact, when he made the payments to those Panamanian bearer corporations. That it was not only his intent that that in turn be paid, paid as bribes, but that in point of fact bribes were paid and as a result of the payment or those bribes, the Government officials made a decision, a conscious decision to award the contract to Kirkpatrick International. So it seems to me that not de jure but de facto we're may be inquiring as to the motivation of the Nigerian Government and why they issued the contract as they did, what they did, how they did it, who is involved, what was paid by whom to whom, et cetera, et cetera.

If you want to wait, I'll get a copy of that transcript where Mr. Levy mentions to Judge Rodriguez that the State Department has not issued a release order and that Mr. Levy has been opposing efforts by the Nigerian Government to gain certain information. I don't have this information and that's about all I know.

Mr. Levy, I think you can pick up on that.

MR. LEVY: Okay. Well, it is indeed true that I took the position at sentencing that the State Department was disinclined to have me release certain names contained in those three incriminatory memos.

Now, I think since the prosecution of the American Citizens and American corporations has technically ended, the only outstanding investigation we have is Occapelli. From the Department of Justice's position it's not a problem for us to release now the information to the government of Nigeria.

THE COURT: That's not my point. Under the act of state doctrine, the courts in general are supposed to steer clear of

conduct which could not only cause embarrassment, but also trouble for the executive through the department of state in conducting foreign affairs. Now, I don't know how high these officials are. There was some reference by you to the president of the Republic of Nigeria was under house arrest. I don't know if that applies to this case or not and I'm not asking for a response.

I'm giving you examples. My point is if we go ahead and develop this information, aside from how the plaintiff is going to develop it, if it does come out, is it going to be a problem for the executive and his conduct of foreign affairs through the Department of State or is it a moot point now? If it's a moot point, I can move on with litigation. If it's not, I have to consider it in light of the act of state inquiry.

MR. PAEY: Fair enough. Let me interpose an observation. Number one, as I take your point, you do consider the disclosure of specific names of alleged Nigerian recipients of bribes to be a relevant and an intergral part of the facts that you have to adjudicate.

THE COURT: At this point I don't say that on the merits, but at this point from what I know about the case, it seems that may be necessary. I could be may on that.

MR. PAEY: Yes.

THE COURT: You're the legal adviser of the Department of State?

MR. PAEY: Deputy assistant legal adviser. And, therefore, you will obviously be in a position to where, assuming that we do — may have some problems with disclosure of names, which we have not yet made a final determination on, and my colleague, Bill Bartlett from the Nigerian desk can confirm this, then you will be in a position than perhaps if we do decide we have a problem with one or more of those names, balancing our foreign policy interest

against whatever you consider the legitimate litigation interest of the litigants to be.

THE COURT: That's what I'm calling on. I'm calling appropos of the act of state Doctrine. I'm also calling to give you an invitation, if you like, to put your two cents, as it were, in this case. If you would like to see the briefs that were filed pro and con on the act of state application in this case, I'll give you that opportunity.

I want to give you notification as to what this is all about. If there is no issue, I don't want to build one here. If there is an issue, I think in light of what Mr. Levy said to Judge Rodriguez, I would be remiss in just ignoring it. That's my only intent here, not to steer you in one direction or another, but merely to give you notification and ask for your input. If you decline, I move from there. I'm not directing anything.

MR. PAEY: We appreciate that. I would like to ask Bill Bartlett if he wishes to address any points.

MR. BARTLETT: I think that we would like to look at the information that the Justice has and confirm exactly what the names are. We haven't made any decision up to this point.

THE COURT: Mr. Bartlett and Mr. Paey, I'm not concerned with just the parochial disclosure of the names. I'm concerned with whether the prosecution of this litigation, with what it may disclose or with what it may decide, would in any way involve the act of state doctrine, in any way violate the separation of the powers between judiciary and the executive in the executives discharge of foreign affairs and the conduct of foreign affairs. It's not just as parochial as disclosure of names, but as I say, it seems, and I understand score the word seems, to me at this point with the little I know about this case, that it may be necessary for the plaintiff to prove not only to whom the bribes were paid, if, in fact, bribes were paid and I don't know that, but also the motivation for the conduct or the thinking or the decision process of the Republic of Nigeria or its officials in awarding this contract. Also I am interested in

knowing whether you regard this as having any impact of the conduct of foreign affairs, the United States.

MR. PAEY: I can tell you that our strategy, our position in coming to this particular conference call, your Honor, has been to get a clarification of what is at stake, how important you feel disclosure is, how relevant you think it is, which you have, in fact, done so that we can be in a position to consult not only with our ambassador and his staff and our embassy in Legos, Nigeria of what the litigation and disclosure of these names also with any other key personnel here in the Department of State, with the bureau.

So we would like, in effect, to be allowed a reasonable amount of time to be able to consult with the necessary other officers of the Department of State and to the implications of these issues and for that purpose we would probably find it — I'm sure we would find it very relevant to obtain copies of whatever pleadings have been filed to date on the act of state doctrine, which would clarify our thinking with regard to what it is they intend to do and go after, because I can see very easily the possibility of depositions of Nigerian officials, being issued letters. Complications like that which may in some respect — it's too early to say, effect our relations with the government of Nigeria at this particular time.

Bill, do you have — Mr. Bartlett, do you have any further thoughts along this line?

MR. BARTLETT: Yeah. I agree completely. The earlier conversations with the Justice on this issue, the amount of information that we have received is somewhat limited by the fact a lot of it was still before the Grand Jury. We would — I'm not entirely clear yet. I haven't seen the memos that are involved, if there are memos, and we would want to look at those and get a better understanding of where this might lead.

THE COURT: I want you all to understand that by this phone call I'm not hinting to you or suggesting to you or

implying to you in any way as to how I'm going to rule on this Active State application.

I'm really giving notification and any of my comments here are not to be meant as rulings, or hints of rulings, in any substantive point in the case. I'm merely giving you possibilities - raising questions only.

MR. PAEY: I guess what we would like to do is now that we have a clear understanding of what's involved, is to have a reasonable time to look at this and come up with a position to answer your questions.

THE COURT: I have no problem with that. That's why I called, to give you an opportunity to have input. I don't want it to drag on indefinitely. What you have to understand here, these motions were filed in May. I came on duty July 15. Case was reassigned to me a week thereafter.

I started reading all this material, communicated with the parties involved about two weeks ago via telephone conference call much like we're having now. I alerted them to some of my considerations. They've sent to me responses to my considerations, to my inquiries, my concerns and at this point I think we're going to receive another series of submissions from the parties involved.

I will give you time to look at it if you like. If you would like to send somebody here to go through the pleadings, I'll be happy to do that. I just don't want it to drag too long.

MR. BARTLETT: Your Honor, in terms of logistics, is there anyway we could get by mail a copy of the pleadings? I realize we're third parties to this and not on service distribution.

THE COURT: I'll have them photocopied. Give me the name and address, room number to whom I should forward these.

MR. PAEY: Forward them to me, Michael Paey, P-A-E-Y, Office of the Legal Adviser, room 5419A, U.S. Department of State, Washington, D.C., 20520.

THE COURT: All right.

MR. PAEY: Perhaps I should give you my number in case there is any delay or something you can reach me. I'm at 202, area code, 647-7324 in case something comes up.

THE COURT: All right.

MR. PAEY: We will very expeditiously review these and we will probably today prepare a cable to our embassy in Legos to at least apprise them of the substance of this conversation and let them know we are awaiting receipt of the pleadings and we may have to consult with them further after we've had a chance to review the pleadings. Then the question becomes in what form and manner we would get back to you, if we did have a view.

THE COURT: Well, I would appreciate knowing if the Department of State says they have no problem with litigation, act of state is not a point in contention any longer. I'd like to know that. If it's not going to bother the conduct of the foreign policy, I'd like to know that. If there is going to be a problem, I'm not sure it's necessary that it be detailed. By definition, detailing it may blunt the objective of the Active State Doctrine. I'd like to know the position. If there is no position, fine. The purpose here is to give you an opportunity to reply.

MR. PAEY: All right. We appreciate that. I don't know that I have any further observations to make at this time.

THE COURT: About four or five minutes into this conversation, the court reporter came in and what we've said has been taken down stenographically. I'm going to send this to the other parties in the case. Any problem with that?

MR. BARTLETT: I don't have any problem.

MR. PAEY: I don't believe I have any problem.

THE COURT: They should be aware of it. We haven't discussed anything in detail here to violate the act of state considerations, but they should be aware of the conversation and the questions I raised. This is a motion for summary judgment, your responses are something I'll be taking into consideration. I stress my comments are hypothetical questions - and are not to be considered anything more than that. This conversation was merely to alert you to some of the facts and inquiries only.

MR. PAEY: How quickly would this court reporter be able to transcribe what we said so we can get a copy?

THE COURT: By tomorrow morning.

MR. PAEY: If we could receive that along with the package of the pleadings?

THE COURT: We'll do that.

MR. APEY: All right.

MR. BARTLETT: I don't have any objection as long as it's clearly understood we haven't taken any position on this.

THE COURT: That's my understanding and I think you've said that now. You're clear.

MR. BARTLETT: Judge Lechner, thank you very much for your consideration and we will try to be as cooperative as we can and expeditiously as we can and we will be back in touch, probably. We have to reach you again, probably submit anything that we have to submit via

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United States Department of State

The Legal Adviser
Washington, D.C. 20520

December 10, 1986

The Honorable
Alfred J. Lechner, Jr.
United States District Court Judge
District of New Jersey
U.S. Post Office and Courthouse
Newark, N.J. 07101

RE: *Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co. Inc., et al.*, Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions...
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the

Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *compare Sage Int'l., Ltd v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981) *with General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

Abraham D. Sofaer

cc: Alan A. Turner, Esq.
Thomas H. Sear, Esq.
Lawrence S. Horn, Esq.
Theodore V. Well, Esq.

SPENGLER CARLSON GUBAR BRODSKY
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280 PARK AVENUE, NEW YORK, N.Y. 10017

December 22, 1986

The Honorable Alfred J. Lechner
District Court Judge
District of New Jersey
United States Post Office
and Court House
Newark, New Jersey 07102

Re: Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Co., Inc., et al.
Civil Action No.: 86-796 AJL

Dear Judge Lechner:

This letter is in response to the recent letter sent from Abraham D. Sofaer, Legal Adviser to the Department of State to this Court. Based on certain factual assumptions and its legal analysis of the act of state doctrine, the State Department through Judge Sofaer indicates that is "does not believe the act of state doctrine would bar the Court from adjudicating this dispute."

We respectfully suggest that the conclusion set forth in the State Department's letter is based on a misunderstanding of the factual issues in this action and of the act of state doctrine. Upon a proper consideration of this action and the doctrine, the State Department's letter mandates dismissal of this action since, as effectively noted in the letter, adjudication of it "may seriously affect United States foreign relations."

First, the State Department does not appear to understand the factual issues directly presented by this action because it states in the first full paragraph on page two, "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Primarily on this basis, the State Department concludes that the act of state doctrine does not apply. However, the State Department's analysis is incomplete because it fails to acknowledge that this action calls into question whether the award of the contract to defendant W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") was illegal. When legality is in question, the act of state doctrine does apply because legality is a concern comparable to validity.

As we set forth in the Submission of Kirkpatrick and defendant D.I.C. (Holding) Inc. ("DIC Holding"), dated August 29, 1986, there is no doubt but that legality of the actions of the Nigerian government is at issue in this action. As stated therein, it is illegal in Nigeria, as in most countries, for government officials to accept bribes in return for the award of public contracts. Adjudication of this action will inevitably require inquiry into whether Nigerian officials awarded the contract to Kirkpatrick on the basis of bribes. Thus, it is clear that the legality of the Nigerian Government's award of the contract to Kirkpatrick is at issue.

Further, the State Department letter itself makes clear that legality is a concern comparable to validity and that when the legality of a foreign government's actions is at issue, adjudication is proscribed. As stated in the quotation on page one of the letter, the act of state doctrine "precludes judicial questioning of the validity or legality of foreign government actions . . . [emphasis original]." Indeed, in language immediately preceding the quotation, the United States expressly stated:

> [T]he act of state doctrine rests upon the need to avoid the particular embarrassment, and the specific interference with the conduct of foreign affairs, that may be presumed to result from a judicial determination that a

> foreign sovereign's act was illegal under either domestic law or the legal standards of the international community. United States Government brief *amicus curiae* in support of a petition for a writ of certiorari in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 969.

Thus, even if the legal opinion that the act of state doctrine does not apply to a judicial inquiry into the motivations of a foreign government's actions were correct, judicial resolution of this action would be barred by the act of state doctrine.

Second, the letter reveals a fundamental misunderstanding on the part of the State Department of the act of state doctrine. Specifically, the State Department concludes in the last paragraph on page two that concerns about the effect of adjudication on foreign relations exist "apart from the act of state question." In fact, such concerns go to the heart of the act of state doctrine. As stated by the Supreme Court: "The act of state doctrine is grounded in judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972). Indeed, the doctrine is designed to avoid exactly the situation which the State Department effectively proposes: one where adjudication of an action by the judiciary would be constrained by concerns about intruding upon the executive branch.

Third, in the letter, Judge Sofaer offers what effectively is a judicial opinion regarding the proper application of the Act of State doctrine. We certainly acknowledge that this Court might be interested in the legal opinions of the State Department on that issue but we would suggest that such opinions are certainly not binding on this Court. Thus, it remains the responsibility of this Court to determine itself the scope and substance of the doctrine and apply it to the factual issues presented here.

Of greatest consequence to this Court is the State Department's view as to whether adjudication of this action might affect foreign relations. In that regard, a fair reading of the letter indicates that the State Department believes that adjudication of the action and the discovery and other related procedures involved in such adjudication might very well seriously affect foreign relations. As the letter states in the last paragraph on page two, actions such as this one "may seriously affect United States foreign relations" and that, should this Court adjudicate the action, "caution and due regard for foreign government sensibilities" would be required throughout the proceedings. These statements make clear that, regardless of other inconsistent, confusing and largely theoretical statements in the letter, adjudication of this action poses in a practical concern to the State Department.

It certainly is clear that the letter fails to offer the express affirmative authorization necessary to justify adjudication. In the letter, the State Department does not find that adjudication will not interfere with United States foreign affairs and that the State Department therefore has no concern about adjudication. Since the State Department has failed to so conclude, this Court lacks the necessary authority to adjudicate this action.

It is well established that express affirmative authorization from the Executive Branch is required for the judiciary to adjudicate actions which call into question the validity or legality of acts of foreign governments. Where the Executive Branch's position as to the lack of a detrimental effect on foreign relations falls short of an unequivocal statement, the doctrine continues to proscribe adjudication. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Here, despite the legal opinions offered by the State Department, there is not such unequivocal statement.

Further, it cannot be argued that the State Department's position here is analogous to the State Department's position in *First National City Bank*, 406 U.S. at 764. In that case, the State Department recognized that the action fell under the act of

state doctrine but stated that from a foreign relations perspective, there was no need for the action to be barred. *Id.* at 764-67. Here, the State Department states that the act of state doctrine may not apply to this action, but that adjudication may seriously affect foreign relations.

Particularly because we believe the State Department's views to rest on an erroneous understanding of the factual issues presented in this action and for all of the other reasons we have discussed, we respectfully submit that continued prosecution of this action would conflict with and is proscribed by the act of state doctrine. Thus, the pending motion to dismiss should be granted.

Respectfully submitted,

Thomas H. Sear

THS:js
Enclosure
(0312j)

cc: Theodore V. Wells, Esq.
Lawrence S. Horn, Esq.
John J. Barry, Esq.
Dominic Amorosa, Esq.
Robert Delventhal, Esq.

Alan Turner (via Telecopier)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,	)	CIVIL ACTION NO. 86-796
Plaintiff	)	JUDGMENT
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*,	)	
Defendant	)	

This matter having been opened to the court on the motion of defendants W.S. Kirkpatrick & Co., Inc, Development International Corporation, DIC (Holding) Inc., W.S. Kirkpatrick & Co. International, Harry G. Carpenter, John M. Krankel and R.H. Edwards to dismiss and for summary judgment, and the court having read and considered the papers submitted in support of and in opposition to the motion, and having heard the oral argument of counsel, and for the reasons set forth in the Court's Opinion dated April 24, 1987 and filed on May 1, 1987, and for good cause shown,

IT IS, on this 1st day of May, 1987,

ORDERED AND ADJUDGED that Counts One, Two, Three, Four and Seven of the Complaint are dismissed with prejudice; and it is further

ORDERED AND ADJUDGED that Counts Five and Six of the Complaint are dismissed without prejudice.

ALFRED J. LECHNER, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL,	)	CIVIL ACTION NO. 86-796 (AJL)
Plaintiff	)	OPINION
v.	)	
W.S. KIRKPATRICK & CO., INC., et al.,	)	
Defendants	)	

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-and-
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Lechner, District Judge

This action was brought by Environmental Tectonics Corporation, International ("ETC") against W.S. Kirkpatrick, Inc. and certain other corporations and individuals. ETC seeks damages in connection with the award of a contract which contract ETC alleges was procured in violation of antitrust and racketeering laws. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be

granted. ETC has filed an amended complaint more specifically alleging certain aspects of the original complaint while adding and dropping certain defendants.

The motions were filed by defendants pursuant to Federal Rule of Civil Procedure 12(b)(6). With the exception of the act of state portion of these motions, it is assumed for the sole purpose of the disposition of these motions the facts alleged in the amended complaint are true and all reasonable inferences have been drawn in favor of ETC. *See D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F. 2d 943, 944 (3d Cir. 1984). Accordingly, the description of the facts concerning these motions is based in large part upon ETC's allegations. With regard to the act of state argument, additional information has been requested from counsel and, as well, from the United States Department of State[1] which information has been considered together with the exhibits attached to ETC's brief in opposition. Therefore, this aspect of the defendants' motions will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; all parties have been so informed and have been given an opportunity to respond. This opinion also addresses plaintiff's appeal of three orders entered by Magistrate Hedges.

I. *Procedural History*

ETC filed a three count complaint naming the following defendants: W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick") (erroneously named as W.S. Kirkpatrick, Inc.); Development

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1 The Department of State was notified by telephone of this matter on September 10, 1986 (a copy of the transcript of the telephone call was made available to all parties). In addition, a copy of all relevant documents was forwarded to the Department of State on September 12, 1986. Because of numerous internal problems, the Department of State repeatedly requested extensions of the time within which to respond to the issues presented by the act of state portion of the motions. On December 10, 1986 a response of the same date was received from the Department of State.

International Corporation ("DIC"); DIC (Holding) Inc. ("Holding"); IDC International S.A. Luxembourg; Harry G. Carpenter ("Carpenter"); and Benson "Tunde" Akindele ("Akindele"). The complaint alleged that defendants' tactics in obtaining a contract with the government of Nigeria violated sections of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962, *et seq.*), the New Jersey Anti-Racketeering Act (§ 2C:41-2, *et seq.*) and the Robinson-Patman Act (15 U.S.C. § 13(c) *et seq.*).

ETC filed an amended complaint which added new counts and more specifically alleged certain aspects of its original complaint. The amended complaint added the following defendants: John M. Krankel; W.S. Kirkpatrick & Co. International ("Kirkpatrick International"); International Development Corporation, S.A. ("IDC"); Emro Engineering Co., Inc. ("Emro"); Robert W. Ruppert; Ross E. Saxon; and R.H. Edwards. DIC was not named in the amended complaint. The amended complaint recited the original counts and added a defamation count against Emro and Ruppert, as well as allegations of interference with prospective contract relations against all the defendants.[2]

Kirkpatrick moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Holding, DIC, Carpenter, Krankel, Kirkpatrick International, and Edwards joined the motion brought by Kirkpatrick. These defendants are referred to herein collectively as the "Moving Defendants".[3]

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2 This case and the motions filed were reassigned to this Court by Order, dated July 16, 1986.

3 Although the Moving Defendants' motions are brought against the sufficiency of the pleadings as set forth in the original complaint, upon review of the record the issues raised by the motions are properly raised against the sufficiency of the pleadings as set forth in the amended complaint. I shall consider the motions accordingly.

The motions collectively raise four distinct issues: first, whether ETC's pleadings allege facts establishing that Carpenter and Kirkpatrick are sufficiently related to Kirkpatrick's corporate parents to warrant the inclusion of the corporate parents as defendants to this action; second, whether ETC's pleadings allege facts showing ETC suffered injury as a result of defendants' alleged antitrust and RICO violations; third, whether ETC's pleadings allege facts to establish a "pattern of racketeering activity," as required by the federal and state racketeering laws; and fourth, whether ETC's claims are barred by the act of state doctrine.[4]

II. *Facts*

In 1954, Carpenter became an employee of Kirkpatrick, a New Jersey corporation, which is involved in the business of selling and brokering aircraft equipment and facilities. At some point prior to 1978, Carpenter became a major shareholder, Chairman of the Board of Directors and Chief Executive officer of Kirkpatrick.

In 1978, Carpenter sold all of his stock and equity interest in Kirkpatrick to Holding. Also in 1978, pursuant to the terms of a consulting and employment agreement, Carpenter agreed to remain as Chairman of the Board and Chief Executive officer of Kirkpatrick for a period of five years. The stock of Holding was, at all times relevant to this motion, owned by IDC, a Luxembourg corporation.

ETC is a Delaware corporation having its principal place of business in Pennsylvania and is engaged in the business of manufacturing and selling aircraft equipment and facilities.

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[4] The results of the third and fourth issues, the RICO and the act of state portions of the motions, are applicable to those defendants who have not so moved or have not yet been served with the complaint or not yet answered the complaint.

At some point during the period 1980-1981, both ETC and Kirkpatrick or Kirkpatrick International sought to procure a contact with the Republic of Nigeria to construct an aeromedical facility at Kaduna Air Force Base in Nigeria and to provide equipment for that facility (the "Nigerian Contract"). In an effort to obtain the Nigerian Contract, Carpenter negotiated an agreement with Akindele, a Nigerian citizen (the "Akindele Agreement"), whereby Akindele was to act on behalf of certain defendants in seeking to procure the Nigerian Contract. The Akindele Agreement provided that certain defendants would pay a "commission" to two Panamanian entities controlled by Akindele if the Nigerian Contract was procured for defendants. The commission was to equal 20% of the Nigerian Contract price; a majority of the commission was to be paid, in turn, as bribes to officials of the Nigerian Government for the award of the Nigerian Contract. During this same period, ETC was negotiating with Nigerian officials to procure the Nigerian Contract, and at some point submitted a bid for the Nigerian Contract.

On March 19, 1982 the Nigerian Contact was awarded to Kirkpatrick International, a wholly-owned subsidiary of Kirkpatrick. Payments on the Nigerian Contract by the Nigerian Government began in September, 1982 and shortly thereafter defendants' payments of the agreed upon commissions to the two Panamanian entities were effected. The alleged commissions were made on four separate occasions, September 30, 1982, December 21, 1982, February 2, 1983 and August 8, 1983, and totaled approximately $2 million. ETC alleges Kirkpatrick International obtained the Nigerian Contract as a result of the commissions paid or promised as bribes to Nigerian officials who otherwise would have awarded the Nigerian Contract to ETC.

Carpenter was prosecuted for a violation of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.*

(Supp. V 1981) ("FCPA").[5] On October 2, 1985 the United States Attorney for the District of New Jersey filed in the Carpenter matter an offer of proof which was signed by Carpenter. This offer of proof establishes certain facts which include the Akindele Agreement and the payment of the commission to the two Panamanian entities in connection with the Nigerian Contract. However, the offer of proof does not establish the payment or promise of bribes to Nigerian government officials. Kirkpatrick was also prosecuted for violations of FCPA. Both Carpenter and Kirkpatrick pled guilty to violation of FCPA.

On January 6, 1986 at the sentencing of Kirkpatrick, Assistant United States Attorney Steven Levy made the following representations to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated... I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the Corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns

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5 This document and a transcript of a sentencing of Kirkpatrick for violation of FCPA were submitted by ETC in opposition to defendants' motions.

> about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,...

(Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22)* (hereinafter "Levy Representations".)

The views of the United States Department of State, dated December 10, 1986 (the "State Department Position") indicate two positions relevant to this matter:

> If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the [Nigerian] contact, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.
>
> Apart from the act of state question, however, inquires into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

State Department Position, at 2-3 (attached as Appendix A).

The government of "Nigeria was informed not later than the end of November, 1985 [of the bribery charges with regard to the Nigerian Contract] as a result of the publicity surrounding the admissions of guilt [to violations of FCPA] and sentences with respect thereto on behalf of Kirkpatrick and Carpenter...." See submission, dated August 26, 1986, of counsel to plaintiff.

On July 31, 1986 counsel for ETC forwarded a letter to the Nigerian Embassy in Washington, D.C. to request a declaration from the Republic of Nigeria "to the effect that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America." The stated purpose of this requested declaration was to nullify the defendants' "act of state" argument to dismiss ETC's complaint.

To date, it appears the Republic of Nigeria has not responded to either the publicity surrounding the FCPA prosecutions or the July 31 letter nor has it taken any action with regard to the allegations surrounding the Nigerian Contract.

III. *Discussion*

A. *Inclusion of Holding and IDC*

In its complaint, ETC appears to present two theories supporting the imputation of liability to Holding and IDC for the alleged wrongful acts of Kirkpatrick and Carpenter: first, that Carpenter acted as an agent of Holding and IDC when he negotiated the Akindele Agreement; and second, that Kirkpatrick was a "mere instrumentality" of Holding and IDC. Holding and IDC maintain ETC has failed to allege facts showing Holding and IDC are sufficiently related to, or responsible for , Kirkpatrick and Carpenter to support the imposition of liability on Holding and IDC for actions taken by

Kirkpatrick and Carpenter. In addition, Holding and IDC maintain ETC has failed to allege facts establishing Carpenter acted as an agent, servant or employee of Holding and IDC during negotiations in connection with the Nigerian Contract. In support of their position, Holding and IDC assert that ETC's pleadings on these issues establish nothing more than Holding and IDC own Kirkpatrick and that Carpenter entered into an employment contract with Kirkpatrick and/or Holding.

Whether an agency relationship exists between a parent corporation and employees or officers of its subsidiary or whether a subsidiary is an instrumentality of the parent is normally a question of fact and degree. The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary. See *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 840-41 (D. Del. 1978). *Accord, Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463, 1478 (D. Kansas 1983).

In addressing the problem of relationships between parent and subsidiary corporations, courts have cited the criteria set forth in *Fish v. East*, 114 F. 2d 177, 191 (10th Cir. 1940), to aid in determining whether a subsidiary is such an instrumentality of the parent corporation that treating the two as one is warranted. *See, e.g., Steven v. Roscoe Turner Aeronautical Corp.*, 324 F. 2d 157, 161 (7th Cir. 1963); *Hoffman*, 575 F. Supp. at 1478; *Japan Petroleum Co., Ltd.*, 456 F. Supp. at 841. The factors to be examined include ownership of the subsidiary's stock, identity of officers and directors of the corporations, financial arrangements of the corporations, responsibility over day-to-day operations of the subsidiary and payment of the subsidiary's salaries and expenses. These criteria aid the Court in determining whether:

> from all the facts and circumstances it is apparent that the relationship between the parent and subsidiary is so intimate, the parents control over the subsidiary is so dominating, and the business and assets of the

> two so mingled, that recognition of the distinct entity would result in an injustice to third-party persons....

Hoffman, 575 F. Supp. at 1478 (quoting from two other cases).

ETC's amended complaint alleges (1) that in 1978 Carpenter entered into an employment contract with Kirkpatrick and/or Holding; (2) that in 1978 Carpenter sold all of his "major" shareholdings and equity interest in Kirkpatrick to Holding; and (3) that various financial aspects of the relationships among the corporate defendants indicate they are engaged, to some extent, in a single economic enterprise.[6] Although ETC's pleadings are not exhaustive, it cannot be said, as a matter of law, the pleadings fail to allege a relationship among Holding, IDC, Carpenter and Kirkpatrick sufficient to support the potential imposition of liability upon Holding or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick.

As Holding and IDC point out in their brief, "whether an agency relationship has been created is a factual question." (Memorandum of DIC and Holding at 14.) ETC relies on *Melikian v. Corradetti*, 791 F. 2d 274, 282 (3d Cir. 1986) which, although not directly on point, provides some guidance: "[t]he issue of whether the corporate veil can be pierced is primarily a question of fact. Plaintiffs have alleged sufficient facts to state a claim and should be permitted to proceed with discovery to further develop the factual record." Accordingly, the ETC pleadings are adequate in this regard.

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6 Specifically, the amended complaint alleges that Holding is the "manager" of Kirkpatrick and that Holding has authority over financial aspects of Kirkpatrick's operations, including payments made in connection with the Nigerian Contract.

B. *ETC's Standing*

The Moving Defendants argue that under the facts pleaded in ETC's complaint, ETC lacks standing to bring its antitrust and RICO claims against them. The Moving Defendants contend ETC's pleadings fail to establish the requisite injury because there are insufficient facts pleaded to show ETC would have won the Nigerian Contract but for the improper actions of the Moving Defendants. Although the original complaint may have been insufficient, the amended complaint pleads ETC's injury sufficiently to survive these motions to dismiss. The amended complaint alleges ETC was competing with the Moving Defendants for the Nigerian Contract and "upon information and belief", but for the alleged improprieties of the Moving Defendants, ETC would have obtained the Nigerian Contract. (Amended Complaint ¶ 40.) Absent unequivocal evidence that ETC was next in line to obtain the Nigerian contract, ETC could not have pleaded its injury with more particularity. Facts may surface showing these allegations are untrue; for present purposes, however, ETC has alleged injury as a result of the actions of the Moving Defendants and has standing to bring its claims.

C. *Pattern Requirement of RICO*

RICO prohibits the use or investment of funds in an enterprise involved in interstate commerce if the funds are "derived, directly or indirectly, from a pattern of racketeering activity..." 28 U.S.C. § 1962(a). RICO defines a pattern of racketeering activity as requiring "at least two acts of racketeering activity . . . ." 28 U.S.C. § 1961(5).

ETC contends the four separate payments of the commissions and the further payment of those commissions as bribes constitute separate acts of racketeering activity to support a finding of the requisite pattern. The Moving Defendants argue RICO's "pattern" mandate requires a showing of separate criminal episodes.

Prior to the Supreme Court's decision in *Sedima, S.P.R.L. v. Imprex Co., Inc.*, _____ U.S. _____, 105 S. Ct. 3275 (1985), courts were divided over the proper construction and application of RICO's pattern of racketeering activity requirement. Some courts held multiple criminal acts in furtherance of a single criminal scheme constituted the requisite pattern. *See, e.g., United States v. Weatherspoon*, 581 F. 2d 595, 602 (7th Cir. 1978) (each mailing in furtherance of scheme to defraud constitutes a separate act of racketeering, thereby establishing a pattern). Other cases held multiple criminal episodes were necessary to establish the pattern of racketeering activity requirement. *See, e.g., Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981) (series of payments in single bribery scheme insufficient to establish RICO pattern).

The Supreme Court's *Sedima* decision offers some guidance in resolving the pattern controversy. Quoting from the Senate Report on RICO, the Court stated: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective.... S. Rep. No. 91-617 p. 158 (1969)." *Sedima*, 105 S. Ct. at 3285 n. 14. The Court's opinion then referred to another section of RICO providing that "'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act." *Id.*

Many courts have relied on footnote 14 of the *Sedima* opinion in declining to find a pattern of racketeering activity where the alleged acts were committed in furtherance of a single fraudulent scheme posing no threat of continuing activity. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F. 2d 252, 255-257 (8th Cir. 1986) (several acts of mail and wire fraud in pursuit of single isolated conversion of theft claim fail to establish requisite pattern); *Emmanouilides v. Buckthorn, Ltd.*, 642 F. Supp. 964, 966 (S.D.N.Y. 1986) (several

fraudulent mail and wire communications not a pattern; "rather, they are components of a single activity, the alleged vessel fraud"); *Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1534 (D. Mass. 1986) ("In applying civil RICO, therefore, it is essential to identify threats of continuing criminal activity, as opposed to isolated criminal events."); *Temporaries, Inc. v. Maryland Nat'l Bank*, 638 F. Supp. 118, 124 (D. Md. 1986) ("Without an open-ended series of activities which comprise a continuing scheme, more than one scheme should be required to establish a 'pattern' of racketeering activity"); *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 8 (D.N.J. January 9, 1986) [available on Westlaw, DCTU database] ("the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstance, is completely unidimensional. It suggests no expansion, no ongoing design, no continuity, such as was the target of Congress in RICO"); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985) (three acts of wire fraud with single victim and scheme insufficient to establish pattern); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985) (mailing of subcontract and several kickback payments in connection with single kickback scheme insufficient to establish pattern).

Some of these courts have argued the Congressional intent behind RICO's pattern requirement was to reach only multiple criminal episodes, such an interpretation being "consistent with the connotation of multiple events implicit in the term 'pattern.'" *Carpenter*, 619 F. Supp. at 478. *See also Fulmer*, 785 F. 2d at 255-57; *Inryco*, 615 F. Supp. at 831. Other courts have asserted a RICO pattern may be established by showing the existence of either (1) more than one unlawful scheme, or (2) "an open-ended continuous scheme which contains a multiplicity of predicate acts." *Temporaries, Inc.*, 638 F. Supp. at 123. *See also Eastern Corporate Federal Credit Union*, 639 F. Supp. at 1535-36; *Kredietbank*, slip. op. at 7-8.

Identification of such an "open-ended continuous scheme" requires an assessment of various factors indicative of the scheme's "continuity." Such factors include "the length of the scheme, the number of predicate acts and the number of victims of such acts, and the likelihood that the scheme would continue indefinitely." *Temporaries, Inc.*, 638 F. Supp. at 123 n. 1A. *See also, United States v. Ianniello*, 808 F. 2d 184, 192 (2d Cir. 1986) ("when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise [RICO pattern exists]").

The second approach for dealing with RICO's pattern requirement offers greater flexibility and appears to be more in line with the Congressional intent behind enactment of RICO. Because it is possible a single unlawful "scheme" could involve sufficient instances of "racketeering activity" amounting to a "pattern" of activity warranting liability under RICO, a blanket rule that "pattern" requires more than one scheme is unsatisfactory. An approach looking for either (1) more than one scheme, or (2) an open-ended scheme, "would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy — those which evidence a true pattern of racketeering activity." *Temporaries, Inc.*, 638 F. Supp. at 124.[7]

ETC claims certain defendants engaged in mail and wire fraud and committed bribery in making the four separate payments to the Panamanian entities for payment to Nigerian officials. These four payments, however, were only in

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[7] Some courts since the *Sedima* decision have adopted, or favorably referred to, a broad interpretation of the RICO pattern. *See, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F. 2d 1350 (5th Cir. 1985); *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494 (N.D. Ill. 1985). However, these cases are not controlling, and, in light of the logical reasoning of the many cases cited above, they are ultimately unpersuasive.

furtherance of the single alleged bribery scheme used to obtain the Nigerian Contract, a scheme which cannot be said to be ongoing or otherwise comprising a "multiplicity of predicate acts." As the cases cited above establish, such an allegation fails, as a matter of law, to set forth a pattern of racketeering activity as required by RICO.

The amended complaint alleges, "upon information and belief", certain defendants have engaged in other improper actions similar to those alleged to have occurred in connection with the Nigerian Contract. (Amended Complaint ¶ 57.) However, the allegation is devoid of factual support and without some such support cannot establish a RICO "pattern" of racketeering activities. RICO is, in essence, a fraud statute, and as Federal Rule of Civil Procedure 9 (b) provides, the facts giving rise to allegations of fraud must be pleaded with some degree of particularity. To hold otherwise would subvert the Congressional intent behind enactment of RICO; every fraud plaintiff could assert a RICO claim simply by pleading, upon information and belief, the existence of another scheme similar to the one truly at issue.

The inherent similarity of a common law fraud action and a federal RICO action was implicitly recognized by the Third Circuit in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F. 2d 786 (1984), *cert. denied*, 469 U.S. 1211 (1985). In that case, the Court reversed a district court dismissal of a RICO complaint. The plaintiff in the case claimed to have been defrauded by the defendant over a twenty-one month period in connection with the sale of some 700 pieces of industrial equipment. Plaintiff claimed defendant had made numerous misrepresentations and omissions in connection with the sale of the equipment, and that such conduct established a pattern of racketeering activity as required by RICO. The district court dismissed the RICO claim because "the complaint failed to set forth 'with even minimal particularity the details of the alleged fraud or misrepresentation.'" *Id.* at 791. The Third Circuit reversed, stating:

> The complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation. In sum, we conclude that [plaintiff] has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9 (b).

Id, (footnote omitted). By contrast, the allegation in paragraph 57 of the amended complaint in this action cannot be said to "adequately describe the nature and subject" of related racketeering activities on the party or the defendants.

ETC has had an opportunity to amend its pleadings so as to make a prima facie showing of the existence of a RICO pattern. Because ETC has failed to demonstrate the defendants or certain of them have engaged in a pattern of racketeering activity, the RICO claims must be dismissed.[8]

D. *Acts of State*

In their Reply Memorandum, the Moving Defendants argue the act of state doctrine bars judicial determination of ETC's claims. Specifically, the Moving Defendants contend that in order to prove violations of the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act or any of these statutes, ETC must establish officials of the Government of Nigeria were paid or knew they would be paid bribes for awarding the Nigerian Contract to Kirkpatrick, and that but for the payment of the bribes, or promise of payment, ETC would have been awarded the Nigerian Contract. The Moving

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8 Since ETC concedes the provisions of the New Jersey Anti-Racketeering Act are to be interpreted in the same way their RICO counterpart provisions are interpreted (Brief of ETC in Opposition to Motions to Dismiss at 16), the New Jersey Anti-Racketeering claims must also be dismissed for failure to set forth the requisite "pattern of racketeering activity."

Defendants argue such proof requires a judicial investigation into acts of the Government of Nigeria or would interfere with the conduct of foreign policy by the Executive Branch of the federal government, either of which is barred by the act of state doctrine.

The act of state doctrine has been defined as one of judicial abstention from an inquiry into the validity of an act by a foreign government within the scope of its sovereignty. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); *Williams v. Curtiss-Wright Corp.*, 694 F. 2d 300, 302 (3d Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d 1287, 1292 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F. 2d 597, 607 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985). Over the years courts have cited several theoretical foundations for the act of state doctrine. In an early application, the Supreme Court explained the doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This language reflects the Court's deference to the inherent nature of sovereign authority and principles of international law upon which the doctrine was traditionally applied. The Third Circuit similarly opined that an act within the sovereign power of a foreign state or by its authorized agent within the scope and authority of the office cannot be questioned or made the subject of proceedings in our courts. *Mannington Mills*, 595 F. 2d at 1292.

"The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories,

Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). It is now also recognized the foundation of the act of state doctrine is rooted in this principle — the separation of powers among the several branches of government. *Sabbatino*, 376 U.S. at 423; *Curtiss-Wright*, 694 F. 2d at 303. The separation of powers rationale is illustrated by the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino, supra*. Applying the act of state doctrine, the Court focused on protecting the basic relationships among branches of government in a system of separation of powers, and not hindering the executive's conduct of foreign policy by judicial review of foreign acts. *Id.*, at 423.

The act of state doctrine has also been interpreted through "notions of comity and a conflict of laws theory that foreign law is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction." *Mannington Mills*, 595 F. 2d at 1292, *citing*, Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum. L. Rev. 1247, 1255 & n. 36 (1977). Thus, the "act of state" is deemed valid under the law of the land where it occurred and is applied as the law of the forum.

Keeping in mind the multi-faceted reasoning offered to support the act of state doctrine, a keystone in its application is the avoidance of "passing on the validity" of acts of foreign governments and the avoidance of conduct, which if effected, "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423. Therefore, if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F. 2d 404, 407 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). This has been held to be equally true of judicial inquiries which would

impugn or question the nobility of a foreign nation's motivations. *Timberlane*, 549 F. 2d at 607.

The act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the affect upon the parties, and the affect upon the internal affairs of the foreign sovereign and the foreign policy of this country. *See* Restatement (2d) of Foreign Relations Law of the United States § 41, Comment d.

In order for ETC to prevail on its claims under the Robinson-Patman Act, RICO and the New Jersey Anti-Racketeering Act, it must be demonstrated the defendants or certain of them intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe,[9] that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that "but for" the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract. Cf. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660 (1960); *Clavco Petroleum*, 712 F. 2d at 407; *Hunt v. Mobil Oil Corp.*, 550 F. 2d 68, 76 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Salerno v. American League of Prof. Baseball Clubs*, 429 F. 2d 1003, 1004 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). Resolution of these critical issues necessarily requires judicial inquiry into the acts of the Government of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country. *See* Levy Representations and

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9 Decree number 38, dated November 22, 1975, of the Federal Military Government of the Republic of Nigeria lists certain prohibited corrupt practices together with the punishment for such corruption. Included within this statute is a prohibition of an individual in the employ of the government receiving or soliciting money for the showing of a favor such as the award of a contract. Decree number 38, Part I.

State Department Position. Cases interpreting the act of state doctrine suggest this is the type of situation which precludes judicial inquiry.

Review of other decisions on this point begins with *Clayco Petroleum*, a case involving a strikingly similar factual situation. In *Clayco*, an oil company sued one of its competitors under the Robinson-Patman Act and other antitrust laws alleging its competitor had made secret payments to an official of Umm Al Qaywayn[10] in order to obtain an offshore oil concession. The trial court granted defendant's motion to dismiss on the ground the action was precluded by the act of state doctrine.

The Ninth Circuit found the actions complained of to be within the purview of the act of state doctrine because the sovereign activity effectuated "public" rather than private interests.[11] *Clayco Petroleum*, 712 F. 2d at 406. In making the public versus private interest distinction, the court noted "[t]his case differs from those relied upon by [plaintiff], in which sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws." *Id.*

The actions which form the basis of ETC's complaint are analogous to those the *Clayco* court found to effect a public interest. Specifically the awarding of the Nigerian Contract by the Ministry of Defense is a decision which may only be made by the Government of Nigeria, its officials or representatives.

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10 The *Clayco Petroleum* court noted the government of Umm Al Qaywayn is a foreign sovereign for purposes of the act of state doctrine. *Clayco Petroleum*, 712 F. 2d at 405 n. 1.

11 The distinction between situations in which a government acts in a commercial rather than a public capacity, the "commercial exception" has not been accepted by a majority of the Supreme Court. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706 (1976) (White, J., joined by three other Justices).

Similarly, the offshore oil concession in *Clayco* was granted by the Government of Umm Al Qaywayn, its officials (the Petroleum Minister), or its representatives.

ETC's characterization of the act in question, as non-public or commercial, is unfounded. Whether it is the purpose or the nature of the act which determines commercial versus sovereign status, the award fo the Nigerian Contract by the Government of Nigeria is a sovereign act. For purposes of applying the act of state doctrine to the present facts, the distinctions between the grant of an oil lease and the award of a military contract are not persuasive.

Although ETC has suggested it is not in fact complaining of the actions of the Nigerian Government, its officials or representatives, and does not characterize the Government of the Republic of Nigeria or any of its agents as "co-conspirators", an indespensible ingredient of ETC's cause of action requires establishg the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law. Liability in this case cannot be attributed to any defendant unless ETC can prove the tendering and payment of the bribe to the appropriate Nigerian officials or at least, as ETC has suggested, the anticipation of such payment and reliance upon such anticipation by the appropriate Nigerian officials and thus the violation of Nigerian law by these government officials. The same considerations are relevant where the acts of a foreign sovereign are questioned directly or collaterally in litigation between private parties. *See Frazier v. Foreign Bondholders Protective Council*, 125 N.Y.S. 2d 900, (1953) ("immunity of a foreign sovereign, in all its implications, is not restricted to warding off only those assaults aimed directly at that sovereign as a party proper.").

The *Clayco* court followed *Occidental Petroleum Corp. v. Buttes Gas & Oil*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). In *Occidental* plaintiff alleged the foreign sovereign issued a fraudulent territorial decree to enable the defendants, in lieu of plaintiff, to export oil and gas in the area covered by the

decree. *Occidental Petroleum*, 331 F. Supp. at 95. While noting *Occidental* involved a territorial decree not present in *Clayco*, the Ninth Circuit noted the underlying dispute in both cases concerned the decision by a foreign government authorizing the exploitation of an important natural resource. The Ninth Circuit noted "it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum*, 712 F. 2d at 407. Accordingly, it is not unrealistic to anticipate judicial scrutiny of the sovereign decisions of the Republic of Nigeria in allocating and awarding contracts with regard to military bases would, if not embarrass the political branches of our government, tend to make the conduct of our foreign policy with Republic of Nigeria more difficult and would require an exploration of the motive and intent of certain Nigerian governmental officials.

In determining whether to apply the act of state doctrine to this situation, ETC contends the court may inquire as to the motivation, rather than the validity, of the questioned activities. In support of this proposition, plaintiff cites *Williams v. Curtiss-Wright Corp., supra*, the Third Circuit's most recent decision in this area. The facts in *Curtiss-Wright*, however, are distinguishable and do not preclude application of the doctrine in this case.

The parties in *Curtiss-Wright* were competitors in the sale of used jet engines, parts and accessories to foreign governments. Plaintiff charged defendant with antitrust and other related state law violations. Specifically, plaintiff alleged defendant monopolized the market and engaged in the common law torts of disparagment, unfair competition, and interference with prospective economic advantage, all of which prevented plaintiff from competing in the worldwide market of reconditioned parts for aircraft engines. *Curtiss-Wright*, 694 F.2d at 301. The complaint regarded the foreign governments, not as participants in the wrongdoing against plaintiff, but as co-victims of the alleged antitrust activity of plaintiff corporation. Accordingly, the thrust of plaintiff's challenges

were the anti-competitive effects of the Curtiss Wright activities and not the validity or motivation of the conduct of foreign governments. Resolution of plaintiff's claims did not require inquiry into the motivation of foreign governments. *Id.* at 303-304.

In contrast to the allegations of the complaint in *Curtiss-Wright,* the amended complaint filed by ETC alleges by necessary implication the involvement by high Nigerian Government officials in the corrupt practices and requires the motivation of these government officials, if not the government as an entity, be examined in order for ETC to prevail on its claims. ETC alleges Akindele acted as the local agent in Nigeria for certain of the defendants in order to secure the Nigerian Contract. As a result of Akindele's efforts the Nigerian Contract was negotiated at a rate which was allegedly twenty percent higher than would be expected in order to provide defendants with the capital to pay the commissions /bribes. In substance, the negotiations and consequent award for the Nigerian Contract, as alleged in the amended complaint, were the result of the Nigerian Government or certain Nigerian officials participating fully in the scheme and agreeing to pay an increased price in order to provide money for the bribes for various Nigerian governmental-political and military figures.

Although the decision in *Hunt v. Mobil Oil Corp., supra,* concerned claims based upon expropriation, the judicial examination of which is traditionally recognized as barred by the act of state doctrine (such circumstances are not present in ETC's alleged complaint), *Hunt* is nevertheless instructive in the weighing process used to determine whether the act of state doctrine is to be applicable. In *Hunt* it was claimed but for an alleged conspiracy, the business of the plaintiff would have continued to thrive. The Second Circuit agreed with the District Court that such allegations "necessarily would require a wholesale examination of Libyan policy — how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease Aresident al-Qadhafi," *Hund,* 550 F. 2d at 78.

Similarly, in this case, in addition to proving the bribe was in fact paid to or anticipated by Nigerian officials, inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe, whether in fact the payment or anticipation of the bribe caused the award of the Nigerian Contract to Kirkpatrick International and whether ETC could have obtained the contract had the bribe not been paid or anticipated. Inquiry into the motivation of the Nigerian government, to the extent anticipated in *Hunt*, appears to be necessary for resolution of this case.[12]

In certain situations, the act of state doctrine has been limited to discretionary, not ministerial acts of a foreign government. For example, in *Mannington Mills* the issue presented to the Third Circuit was the issuance of a patent by a foreign government. This action was regarded by the Third Circuit as ministerial or an insignificant act of the sovereign. The granting of patents *per se* was found not to be within the perview of the act of state doctrine since it is not the type of sovereign activity that would cause substantial concern to the executive or legislative branches of our government.[13] Accordingly, there was no reason to bar the suit because of foreign policy concerns. *Mannington Mills*, 595 F. 2d at 1294. In this same vein, the Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) is recognized to stand for a commercial exception to the act of state doctrine. *See* n. 11, *supra*. This exception in essence acknowledges that when a government acts in a commercial mode it is not acting as a sovereign and therefore the doctrine is inapplicable.

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12 In *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 n. 24 (E.D. Mich. 1981), the court sought to distinguish a "kickback" in a situation which is not relevant to this litigation.

13 It is noted *Mannington Mills* did not create an exception to the act of state doctrine based on the ministerial-discretionary dichotomy. *See Curtiss-Wright*, 694 F. 2d at 303.

Clayco Petroleum is also significant because the Court distinguished application of FCPA and indicated the FCPA is not an exception to the act of state doctrine. *Clayco Petroleum* indicates FCPA was intended to stop bribery and noted both the Justice Department and the Securities and Exchange Commission share enforcement responsibilities under FCPA. The opinion noted that any governmental enforcement represents a judgment of the Executive Branch on the wisdom of bringing a proceeding in light of the exigencies of foreign affairs. Act of state concerns are thus inapplicable, to the extent of a FCPA prosecution, since the purpose of the doctrine is to prevent the judiciary from interfering with the conduct of foreign affairs. *Clayco Petroleum*, 712 F. 2d at 408-409, *citing*, *Sabbatino*, 476 U.S. at 423; *Timberlane*, 549 F. 2d at 605. *Clayco Petroleum* also suggests it is the screening of governmental proceedings, with state department consultation, which distinguishes FCPA enforcement from private suits. In private suits, the act of state doctrine remains necessary to protect proper conduct of national foreign policy. *Id.* 712 F. 2d at 409.

Significantly, prosecution was had against both Carpenter and Kirkpatrick. The offer of proof executed by Carpenter is carefully worded and does not establish any bribes were in fact paid to a member of the Nigerian Government although it adequately sets forth the requirements to establish Carpenter intended such action to take place. Thus, a violation of FCPA was demonstrated. Likewise, the transcript with regard to the sentencing of Kirkpatrick for the violation of FCPA sets forth the concern of the United States Government and the lack of a disclosure order from the State Department with regard to the allegations of bribery concerning the Nigerian Contract. Read together, these documents indicate a conscious decision on behalf of the Executive Branch through the Department of State for a limited prosecution under FCPA (limited in the amount of disclosure of facts) and the efforts of the Government in resisting attempts by the Nigerian Government in discovering

information with regard to what Carpenter knew of the payment of the bribes.[14]

In light of the State Department Position, ETC has suggested application of a form of the so-called "Bernstein" exception to the act of state doctrine.[15] The State Department Position indicates: "As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question." Additionally, the State Department states that judicial inquiry into "motivations of the Government of Nigeria's decision to award the [Nigerian C]ontract" would not be precluded by the act of state doctrine. The State Department

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[14] In addition to all of the allegations in the amended complaint which allege by necessity Nigerian Government involvement, Article XX of the Nigerian Contract provides that "[t]his Agreement shall be governed, interpreted and controlled by the laws of the Federal Republic of Nigeria...." In Article XXI of the Nigerian Contract provides for disputes "to be submitted to an Arbitration Court convened under the rules as provided under the Arbitration Laws of Nigeria...." To date, the government of the Republic of Nigeria has not taken any steps to reputiate the acts of its governmental officials. This inaction is significant.

It has been noted in two decisions that unreputed acts of a foreign government can be scrutinized if they resulted from corruption of government officials. *Sage Intern*, 534 F. Supp. at 910; *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979). *Sage* relies upon *Gulf & Western* and *Gulf & Western* cites *Hunt*, 550 F. 2d at 79 as authority for this statement. However, *Hunt* specifically states: "This appeal therefore is not the proper vehicle for consideration of international commercial bribery insofar as it affects the act of state doctrine." *Id.*

[15] In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (Brennan, J., dissenting) *reh'd denied*, 409 U.S. 897 (1972) a plurality of the Supreme Court adopted the "Bernstein" exception. "[W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *Id.*

Position, however, goes on to note inquiries into the motivation and validity of actions by foreign states and discovery against foreign government officials may seriously affect United States foreign relations. (Appendix A). As such the State department fails to clearly "sign off" on the application of the act of state doctrine in this case.

The State Department opines that:

> inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials *may seriously affect United States foreign relations*. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at *each relevant stage* in the proceedings. Moreover, *the court should* endeavor to *assure* that *no unnecessary inquiries* are made, *or allegations* tested during the course of discovery or trial.

(Appendix A, emphasis added). It is significant that in light of this caution, *this court* is urged "to assure that no unnecessary inquiries are made, or allegations, tested during the course of discovery or trial."[16] *Id.*

The overview and judgments of this court, as urged by the State Department, may well have a significant impact on the foreign affairs of this country — an area of decision-making

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16 For example, a consideration of this concern of the State Department clearly would have to include the issuance of a subpoena for records in Nigeria. Since such an action may well affect the foreign relations of this country, a court must weigh the interests of this country and Nigeria before issuing such a subpoena. A court must give "deference to the determination by the Executive Branch — the arm of the government charged with primary responsibility for formulating and effectuating foreign policy — that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure." *United States v. Davis*, 767 F. 2d 1025, 1035 (2d Cir. 1985) (citations omitted). This is not what is suggested by the terms of the State Department Position.

the Constitution largely commits to the discretion of the Executive. Before launching investigations on foreign soil, or of foreign nationals, or of matters implicating international diplomacy, the Executive has the option to weigh the implications of such conduct on the overall foreign policy of this country. This obviously will not happen in the scenario suggested by the State Department Position.

Equally important to this court's determination of whether the parties to this matter are making unnecessary inquiries or testing unnecessary theories is whether there is any risk to national security. The Executive Branch must make the decisions as to whether disclosure of facts will have any ramification on disclosure of intelligence sources as well as on diplomatic relations. In this regard, as noted earlier, Carpenter's offer of proof upon which his criminal conviction for violating FCPA is based is carefully and narrowly worded. It cannot be said such careful wording is without intent or significance. See, the Levy Representations.

The significance of the impact of this case on the Government of Nigeria (see the Levy Representations) and on the conduct of this country's foreign policy (see the State Department Position) is obvious. The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy.[17]

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17 No individual who is responsible for or knowledgeable of this nation's foreign policy or security will be in a position to know of the pretrial and trial decisions and evaluate their impact on foreign policy. Moreover, even if such person were available to the court, counselling the court for or against such decisions would pose serious problems of, at the least, an appearance of impropriety. Moreover, such a procedure (although not explicitly suggested by the State Department) would bring the basic separation of powers rule into question. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1

(Footnote continued)

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat v. United States*, 219 U.S. 346, 355 (1911) (citation omitted). The essence of judicial power is the resolution of cases or controversies. *Id.* at 356. There is a notable absence of Constitutional authority for a court to assume responsibility for the conduct of a segment of foreign policy, which is what the State Department suggests.

Neither Congress nor the Executive may vest in or assign to judges holding office under Article III powers beyond those clearly confined to them by the Constitution. Nor may courts exercise such powers if granted or delegated. *See Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Muskrat*, 219 U.S. at 356; *Ex Parte Siebold*, 100 U.S. 371, 398 (1879).

There are foreign policy considerations involved in ETC's providing its cause of action. Proof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria with regard to its failure to date to take action against government officials involved and/or other individuals involved. The July 31 letter from counsel to ETC to the Republic of Nigeria requesting a declaration of approval with regard to this civil litigation, even if a Nigerian response is forthcoming, is not dispositive of the issues. Indeed, it is the conduct of foreign policy by the Executive and Legislative Branches of this Government which must be controlling.

ETC's amended complaint is aimed at alleged antitrust and RICO violations of defendants which require inquiry into the actions, conduct and motivation of the Republic of Nigeria and its agents. Although "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the

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Annals of Congress 581, (quoted in *Myers v. United States*, 272 U.S. 52, 116 (1926)).

absence of a showing that adjudication may hinder international relations[,]" *Curtiss-Wright*, 694 F. 2d at 304 (citation omitted), I am satisfied the Moving Defendants have established[18] the actions, conduct and motivation of the Republic of Nigeria and its agents are "...basic and fundamental to the alleged antitrust [,RICO and other] behavior and [are] more than merely peripheral to the overall [alleged] illegal course of conduct." *Mannington Mills*, 595 F. 2d at 1293. Moreover, the suggestion of the State Department is neither practical nor constitutional. The motion to dismiss because of the act of state doctrine is granted.

E. *Appeals of Magistrate's Orders*

1. *Standard of Review*

Also before the Court are three appeals of orders entered by Magistrate Hedges, two of which are discovery related and the third sustains Carpenter's claim of privilege against self-incrimination which defendant asserted at his deposition. In considering each of the three appeals, the Court must apply the standard of review of a magistrate's order as set forth at 28 U.S.C. § 636 (b) (1) (A), Fed. R. Civ. P. 72 (a), and Rule 40(a) of the Local Rules of the United States District Court for the District of New Jersey. The Third Circuit has held a magistrate's order can be set aside only if it is found to be clearly erroneous or contrary to law. *Cipollone v. Liggett Group, Inc.*, 785 F. 2d 1108, 1113 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987).

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire *record* is left with the definite and firm conviction that a mistake has

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18 It is the burden of the Moving Defendants to establish the applicability of the act of state doctrine. *Curtiss-Wright*, 694 F. 2d at 303 n. 4, *citing Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684 (1976).

been committed." *Agricultural Services Assn., Inc. v. Ferry-Morse Seed Co.*, 551 F. 2d 1057, 1071 (6th Cir. 1977), *quoting United States v. Gypsum Co.*, 333 U.S. 364, 365 (1948). Several courts have also held that a magistrate's order in a discovery dispute is subject of great deference and will only be reversed if found to be an abuse of discretion. *See Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D. N.Y. 1982); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 95 F.R.D. 398, 399 (S.D. N.Y. 1982), *aff'd* 814 F. 2d 90 (2d Cir. 1987).

2. *Appeal from the May 30, 1986 Order*

ETC appeals from an order entered by Magistrate Hedges on May 30, 1986[19], which stayed plaintiff's discovery pending disposition of the motions to dismiss.

The court converted the defendants' motion to dismiss into a summary judgment motion only on the limited question of the applicability of the act of state doctrine because of the additional submissions. In response, ETC filed the instant appeal on the incorrect assumption that additional discovery on the act of state is necessitated. Accordingly, ETC appeals on the ground that the magistrate's order is "an abuse of discretion and contrary to law" (ETC's Notice of Appeal) because ETC is deprived of conducting discovery which may produce facts relevant to the act of state issue. However, applicability of the act of state doctrine (*see* Section D) is purely a legal question, the resolution of which requires no further factual development. Furthermore, additional discovery is inconsistent with the conclusions regading [sic] the act of state doctrine. The taking of discovery by ETC would necessarily

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19 This appeal was not filed within the time limit prescribed by Local Rule 40(b) (4) (a), however, due to the somewhat confusing circumstances surrounding these motions, it shall be considered. The Affidavit of Alan A. Turner dated September 10, 1986, and the Memorandum of Law in Support of the Notice of Appeal submitted in connection with this motion detail the facts regarding these circumstances.

involve inquiry into the action of the Nigerian Government and its officials.

Applying the limited standard of review mentioned previously, ETC has not demonstrated the magistrate's order is clearly erroneous or contrary to law. Only after the court posed questions to counsel regarding the act of state question did ETC seek further discovery which was unnecessary for the motion. At the present juncture, additional discovery is contrary to the application of the act of state doctrine. Accordingly, the magistrate's order is affirmed.

3. *Appeal of the July 16, 1986 Order*

During his June 30, 1986 deposition Carpenter asserted his privilege against self-incrimination and refused to answer certain questions. Magistrate Hedges sustained Carpenter's claim of privilege in a Letter-Order and Opinion, dated July 16, 1986. This appeal followed.[20]

Prior to his deposition, Carpenter submitted an affidavit (the "Carpenter Aff.") setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual bases for assertion of the privilege. As discussed earlier in this opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media coverage and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. (Carpenter Aff., ¶ 2) Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian Contract. (*Id.* at § 3) Akindele further warned Carpenter not to travel to Nigeria and to exercise extreme care

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20 Disposition of the appeal was postponed until oral argument and decision on the motion to dismiss.

in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. (*Id.* at ¶ 4)

In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." (*Id.* at ¶ 5) This information, which originally came from Interpol, was relayed to Carpenter. (*Id.* at ¶ 5) Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated." (*Id.* at ¶ 6)

In sustaining Carpenter's Fifth Amendment privilege, Magistrate Hedges applied the guidelines set forth in *United States v. Flanagan*, 691 F. 2d 116 (2d Cir. 1982). In *Flanagan*, defendant was subpoenaed to appear before a federal grand jury which was investigating an alleged gun-smuggling conspiracy in operation for the benefit of the Irish Republican Army in Ireland. After his intent to invoke the Fifth Amendment was known, defendant Flanagan was granted immunity from the use of his testimony against him in any subsequent criminal proceeding. *Id.* at 119.

Flanagan's motion to quash the subpoena was based in part on the argument that because the grant of immunity would not protect him from prosecution in foreign countries, a protection coexistive with the Fifth Amendment privilege. Although the Second circuit found "Flanagan's fear of foreign prosecution, viewed objectively, [to be] remote and speculative rather than real, reasonable, or substantial" *id.* at 122, the court's discussion of factors to be considered in making such a ruling is helpful.

Among the factors detained in *Flanagan* are the "reality or remoteness of the risks of incrimination under foreign law" *id.*, the existence of foreign laws authorizing prosecution of the criminal acts in question, whether the testimony may enable the foreign government to seek extradition, and whether the testimony is likely to be disclosed. *Id.* at 120-23. In his decision, Magistrate Hedges considered these factors as

applied to Carpenter and concluded the privilege should be upheld.

On appeal, ETC contends the protection afforded by the Fifth Amendment is not available to Carpenter because he has already pled guilty to a violation of the Foreign Corrupt Practices Act. Furthermore, ETC disputes the existence of a real threat of prosecution. Alternatively, ETC suggests the testimony should be taken under a protective order.

The Fifth Amendment guarantees every person freedom from self-incrimination and protects a witness against providing testimony "leading to the inflictions of penalties affixed to ... criminal acts." *Kastigar v. United States*, 436 U.S. 441, 453 (1972) *reh'g denied*, 408 U.S. 931 (1972) (citations omitted). The protection is available where the testimony "would furnish a link in the chain of evidence needed to prosecute" the witness for a crime, provided "the witness has reasonable cause to apprehend danger from a direct answer." *Hofman v. United States*, 341 U.S. 479, 486 (1951). Consideration of ETC's arguments necessitate a review of the standard for invoking claims of the Fifth Amendment privilege.

The extent to which the Fifth Amendment privilege may properly be asserted on the grounds of potential prosecution in foreign countries is unclear. *United States v. Kowalchuk*, No. 77-118, slip op. (E.D. Pa. Oct. 20, 1978).[21] There is, however, agreement that the Fifth Amendment only protects against real and substantial threats of incrimination, not speculative or theoretical possibilities. *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 478 (1972). In assessing the severity of threat, one court has found there to be a

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[21] This unreported decision was included in Carpenter's opposition to the appeal and was therefore available to all counsel.

> common theme to all of the reported cases in that questions relating directly to criminal activities in foreign countries pose a more serious threat of incrimination than do questions about events and activities within this country having only direct and remote connection to foreign culpability.

Kowalchuk, slip op. at 4, citing *In re Parker*, 411 F. 2d 1067 (10th cir. 1969), *vacated as moot, Parker v. United States*, 397 U.S. 96 (1970); *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972).

ETC contends the Fifth Amendment protection is not available to Carpenter in light of Carpenter's previous plea of guilty to violation of the FCPA. This argument is not persuasive for two reasons. First, there would be no need to depose Carpenter if the information sought had been disclosed in connection with Carpenter's earlier prosecution. It is logical then to assume the requested information goes beyond the investigation under the FCPA. Therefore, Carpenter may invoke the Fifth Amendment to avoid further incrimination. Second, case law supports protection of Carpenter's testimony because prior disclosure is not held to be a waiver of the privilege. *United States v. Yurasovich*, 580 F. 2d 1212, 1218-1220 (3d Cir. 1978).

> The initial statement is incriminating, a subsequent statement on the same subject would necessarily be further incriminating because the second statement would cooroborate the earlier statement, making it more difficult for the witness to discount the earlier statement and hence increasing the danger of conviction.

Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F. Supp. 45, 49 (S.D.N.Y. 1982) *quoting E.F. Hutton & Co. v. Jupiter Development Corp.*, 91 F.R.D. 110, 115 (S.D.N.Y. 1981).

ETC also challenges Carpenter's assertion of the Fifth Amendment on the ground that Carpenter's fear of foreign prosecution is not founded. This argument ignores certain relevant facts. As previously detailed, Carpenter has been informed on more than on occasion of the danger he faces by travelling in Europe or Africa (Carpenter Aff. at ¶ 4) and of Nigerian official's desire to prosecute him. (*Id.* at ¶ 3) These facts are not properly ignored because determinations as to whether the privilege is justified are to be made by the trial court based on the particular circumstance of each case. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Furthermore, contrary to ETC's contentions, a pending foreign prosecution is not a prerequisite to Fifth Amendment protection. *See Kawalchuk*, slip op. at 8 ("[t]he actual pendency of criminal proceedings is not a perrequisite to the successful invocation of the Fifth Amendment privilege."), *In re Cardassi*, 351 F. Supp. at 1085 (interpreting *Zacarelli*, not to require any indication that a foreign prosecution is "imminent.").

The magistrate's decision to uphold Carpenter's Fifth Amendment claim has not been shown to be clearly erroneous or contrary to law. Based on the magistrate's thorough discussion and this court's independent analysis of the relevant facts and applicable case law, the magistrate's decision shall be affirmed.

4. *Appeal of the January 20, 1987 Order*

As part of discovery, ETC issued a deposition notice and subpoena *duces tecum* to Steven Levy, an attorney with the Department of Justice. ETC sought Mr. Levy's deposition and production of materials obtained by Mr. Levy in connection with an ongoing grand jury investigation. The United States of America ("the Government") moved to quash the subpoena pursuant to Rule 26 (c) Fed. R. Civ. P.

On January 20, 1987, Magistrate Hedges granted in part and denied in part the Government's motion to quash, and

ETC appealed. At oral argument it was determined the issues on appeal had been rendered moot because the subpoena was withdrawn. (3/6/87 Tr. 61:6-13)

Conclusion

Because ETC's amended complaint alleges facts sufficient, for the purposes of these motions to dismiss the pleading, to establish a relationship among Holding, IDC, Carpenter and Kirkpatrick to support the potential imposition of liability upon Holding and IDC for wrongful actions of Carpenter and Kirkpatrick, the motion to dismiss Holding and IDC as defendants is denied.

Because ETC's amended complaint alleges that ETC failed to procure the Nigerian Contract because of the alleged antitrust and RICO violations committed by defendants, the motion to dismiss those claims for lack of standing is denied.

Because ETC has failed to allege in its pleadings facts establishing a pattern of racketeering activity as required under RICO and the New Jersey Anti-Racketeering statutes, the motion to dismiss ETC's anti-racketeering claims is granted.

Because of the act of state doctrine, the motion to dismiss ETC's complaint against the defendants is granted.

The parties have agreed to dismiss without prejudice counts five and six of the complaint.[22] Accordingly, counts one, two, three, four and seven are hereby dismissed with prejudise; counts five and six are dismissed without prejudice pursuant to agreement of counsel.

Dated: April 24, 1987

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[22] See letter of March 16, 1987 from counsel on behalf of Emro and Ruppert to counsel for plaintiff.

(Exhibit A to April 24, 1987
Opinion of Judge Lechner)

December 10, 1986 Letter to Abraham D. Sofaer to the Hon. Alfred J. Lechner, Jr., is reproduced at A-267-269.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,	)	CIVIL ACTION NO. 86-796
Plaintiff	)	
v.	)	
W.S. KIRKPATRICK & CO., INC., *et al.*,	)	
	)	NOTICE OF APPEAL
Defendant	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff Environmental Tectonics Corporation, International hereby appeals to the United States Court of Appeals for the Third Circuit from the final Judgment entered in this action on the 1st day of May, 1987.

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Dated: May 12, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5328 and 87-5546

ENVIRONMENTAL TECTONICS

v.

W.S. KIRKPATRICK INC.,
DEVELOPMENT INTERNATIONAL CORPORATION,
DIC (HOLDING) INC.
IDC INTERNATIONAL
S.A. LUXEMBOURG
HARRY G. CARPENTER
c/o W.S. Kirkpatrick, Inc.
and
BENSON "TUNDE" AKINDELE
JOHN M. KRANKEL, EMRO ENGINEERING CO., INC.
ROBERT W. RUPPERT c/o EMRO ENGINEERING CO., INC.
ROSS E. SAXON c/o NAUTILUS ENVIRONMENTAL
SYSTEMS, INC.
& R.H. EDWARDS

Environmental Tectonics
Corporation International
Appellant in 87-5328

W.S. Kirkpatrick & Co., Inc.,
W.S. Kirkpatrick & Co.,
International and D.I.C.
(Holding) Inc.

Appellants in No. 87-5546

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 86-0796)

Argued November 20, 1987

BEFORE: GREENBERG and SCIRICA, Circuit Judges and POLLAK, District Judge*

(Filed May 2, 1988)

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

POLLAK, District Judge:

Appellant Environmental Tectonics Corporation International ("ETC"), a Pennsylvania corporation, brought this action to recover damages against several defendants for, *inter alia*, violations of the federal Racketeering Influenced Corrupt Organizations Acts, 18 U.S.C. § 1962-1968, the New Jersey Anti-Racketeering Act, 2C N.J.C.S. § 41-1, and the Robinson-Patman Act, 15 U.S.C. 13(c). Essentially, ETC claims to have been injured by an apparently successful scheme, allegedly participated in by all of the defendants, to influence the award of a Nigerian defense contract through bribery of Nigerian government officials. The district court concluded that the act of state doctrine barred adjudication of ETC's claims, and dismissed the action in its entirety. In the alternative, the court also ruled on other substantive and procedural issues.

I.

This action arose from the award of a contract by the Federal Republic of Nigeria to defendants W. S. Kirkpatrick & Co. ("Kirkpatrick") and W. S. Kirkpatrick & Co. International ("Kirkpatrick International"), both of which are New Jersey corporations. Kirkpatrick is in the business of selling and brokering aircraft equipment, parts and facilities to airlines and foreign air forces. Kirkpatrick International, its whollyowned subsidiary, was formed to carry out Kirkpatrick's duties under the contract to be awarded by the Nigerian government. Also named as defendants were Kirkpatrick's parent corporations, DIC (Holding) Inc. ("DIC"), a Delaware Corporation, and International Development Corporation, S.A. ("IDC"), a Luxembourg corporation.

In 1980, when the events alleged in the amended complaint[1] began, defendant Harry Carpenter was chairman of Kirkpatrick's board of directors and the company's chief executive officer. In 1980, Carpenter learned that the Nigerian government was interested in purchasing aeromedical equipment, and in constructing and equipping an aeromedical center for the Nigerian Air Force at Kaduna Air Force Base (the "Air Force contract"). Kirkpatrick contracted with defendants Emro Engineering Co., Inc. ("EMRO") and Nautilus Environmedical Systems, Inc. ("Nautilus") to provide engineering, design and related assistance needed to build the proposed facility and to supply the equipment.

Carpenter hired a Nigerian national, defendant Benson ("Tunde") Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the Air Force contract. In or around March of 1981, Carpenter and Nautilus president Ross Saxon[2] met with Akindele to discuss their bid strategy. According to a contemporaneous memorandum written by Carpenter, Akindele told Carpenter and Saxon that to secure the bid Kirkpatrick should be prepared to pay a sales commission totalling twenty percent (20%) of the contract price. Most of this commission was to be paid to Nigerian political and military officials.[3] Akindele explained that Nigerian officials generally expected such payments from contract bidders, and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.

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[1] The following factual recital is based primarily on the amended complaint.

[2] Saxon and Robert Ruppert, Emro's president, were also named as defendants. Two other Kirkpatrick officers, Robert H. Edwards and John M. Krankel, were named as well.

[3] ETC alleged in its complaint that the 20% commission was to be distributed as follows: 2 1/2% for Akindele, 5% for the Nigerian Air Force, 2 1/2% for the medical group, 5% for a political party, 2 1/2% for the relevant cabinet minister, and 2 1/2% for other key defense personnel.

Through a written agreement with Akindele, Kirkpatrick agreed to pay the commissions to two Panamanian corporations. In May of 1981, these corporations — which were controlled by Akindele — were established to receive the commissions and to distribute them to Nigerian officials. On March 19, 1982, the Nigerian Defense Ministry entered into an agreement awarding the Air Force contract to Kirkpatrick International. In September of 1982, the Nigerian government made the first of four contract payments to Kirkpatrick. The remaining payments were made in December of 1982, in February of 1983, and in August of 1983. After each of the four contract payments, the defendants via the United States mails and wire transfers paid a portion of the promised commissions to Akindele's Panamanian corporations, whence the monies were distributed to Nigerian officials. In the end, Kirkpatrick's commission payments to the Panamanian corporations, and thus, to Akindele and various Nigerian officials, totalled over $1.7 million.

In the latter half of 1981 and 1982, while Kirkpatrick was implementing the bid strategy described above, ETC, which is also in the business of selling aeromedical equipment to foreign governments, was preparing its own bid for the Air Force project. ETC submitted its pricing information to the Nigerian government in February of 1981, and it continued in contact with Nigerian military and diplomatic officials throughout the course of that year. ETC's president met with Nigerian officials in Nigeria, and submitted a formal bid for the Air Force contract in December of 1981. ETC submitted its final formal bid in February of 1982, a month before the Nigerian government awarded the contract to Kirkpatrick.

ETC states that it decided to investigate the Nigerian government's award of the Kaduna contract to Kirkpatrick in April of 1983, after learning that its bid had been far lower than Kirkpatrick's. ETC reported its findings to the Nigerian Air

Force[4] and to the United States Embassy in Lagos, Nigeria. After an investigation by the United States Justice Department, Carpenter and Kirkpatrick each were charged with violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2 (hereinafter "FCPA").

As part of its plea negotiations on the United States charges, Kirkpatrick and Carpenter both agreed to offers of proof which outlined the Air Force contract scheme in its entirety, including Carpenter's hiring of Akindele, and Akindele's control of the Panamanian corporations. Both offers of proof also stated that Akindele and Carpenter agreed that the money paid to the Panamanian corporations as commissions would be distributed to Nigerian political and military officials. Carpenter and Kirkpatrick both pled guilty to one FCPA violation, and were eventually sentenced: Carpenter to two hundred hours of community service and a fine of $10,000, and Kirkpatrick to a fine of $75,000, payable over a five-year period.[5]

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[4] Both bribery and the acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No.38 (November 22, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

[5] At Kirkpatrick's sentencing on January 6, 1986, Assistant United States Attorney Steven Levy, who was in charge of Carpenter's and Kirkpatrick's prosecutions, made the following representation to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated [sic]. ...I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.

(Footnote continued)

ETC filed this action shortly after Kirkpatrick's sentencing. Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which contended, *inter alia*, that the plaintiff had failed to allege a "pattern of racketeering activity" as required by the federal and state RICO statutes. ETC filed an amended complaint that responded to some of the issues raised by the defendants' motion to dismiss, and that added common law counts to ETC's antitrust, RICO, and antiracketeering counts. ETC also filed an answer to the remainder of the defendants' motion to dismiss.

In their reply to ETC's answer to their motion, defendants moved for dismissal of the action in its entirety on act of state grounds. The district court requested further submissions from the parties in the form of answers to specific questions. The court also requested a *Bernstein* letter, i.e., an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by this case.[6] Legal Adviser Abraham Sofaer responded to the

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> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]apartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
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> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals [,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names,....

Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, l. 21 to p. 10 l. 22.

[6] The term "*Bernstein* letter" is derived from the Second Circuit's opinion in *Bernstein v. N.V. Nederalandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). Plaintiff Bernstein, a

(Footnote continued)

court's request in a letter dated December 10, 1986, which is appended to this opinion. Treating defendants' motion to dismiss as a motion for summary judgment, the district court dismissed the action on act of state grounds. *See Environmental Tectonics Corp., International v. W. S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381, 1391-98 (D.N.J. 1987).

Although the dismissal on act of state grounds embraced ETC's entire claim against all the defendants, the district court went on to rule, in the alternative, on other issues: The court rejected defendants' contention that ETC lacked standing to assert antitrust and RICO claims. The court did, however, dismiss the RICO count for failure to allege a pattern of racketeering activity. For the same reason, the court dismissed the New Jersey Anti-Racketeering count. In addition, the court upheld a magistrate's determination that Carpenter was entitled to decline to answer, on Fifth

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German national, owned a corporation that was confiscated by the Nazi government during World War II. The corporation's main asset was a ship; Bernstein was forced to relinquish title to the ship, as well as all other interest in the corporation. The Second Circuit initially dismissed Bernstein's suit against the ship's subsequent owners on act of state grounds. *See Bernstein v. Van Heygen Freres Societe Anonyme*, 186 F..2d 246 (2nd Cir. 1947). The court reversed itself after receiving a letter from the State Department's Legal Adviser, which stated that it was United States policy to permit the courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials.

The Supreme Court subsequently determined that, while it was proper for a federal court to consider a *Bernstein* letter, the Legal Adviser's recommendation in any given case was not to be considered binding on the court. In *First National City Bank v. Banco Nacional de Cuba*. 406 U.S. 759 (1972), Justice Rehnquist, announcing the judgment of the court, argued that the federal courts should defer to the view of the State Department; but only two other members of the court, Chief Justice Burger and Justice White, joined in his opinion. Justices Douglas and Powell, each of whom concurred separately, rejected the view that the State Department's view should control. So, too, did Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun in dissent.

Amendment grounds, certain questions put to him on deposition. Finally, the court held that ETC's amended complaint adequately stated a case for holding IDC and DIC legally responsible for Kirkpatrick's scheme to obtain the Air Force contract.

ETC appeals from the act of state, RICO, and Fifth Amendment rulings. The defendants, in addition to urging the correctness of these rulings, have cross-appealed from those alternative rulings that were adverse to them. Since the district court's grant of summary judgment on act of state grounds, if affirmed here, would obviate consideration of all other issues, we turn first to the act of state question.

II.

On review of a district court's grant of summary judgment, we utilize the same standard that the district court was required to apply. See *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3rd Cir. 1987). There is no real disagreement on the facts relevant to the district court's act of state determination. On this appeal, therefore, we are called upon to decide whether the appellees were entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

ETC's challenge to the district court's grant of summary judgment raises important issues about the proper application of the act of state doctrine. The doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of this country will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders. *See Restatement (Revised) of Foreign Relations Law of the United States* § 469[428] (1986). The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case. *See Alfred Dunhill of London. Inc. v.*

Cuba, 425 U.S. 682, 694 (1976); *Williams v. Curtiss-Wright*, 694 F.2d 300, 303 n.4 (3rd Cir. 1982).

Although earlier formulations of the doctrine were grounded in notions of comity among sister states,[7] the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government — especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* at 423. Thus, courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. *See First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972) (hereinafter "*Citibank*").

Sensitively applied, the doctrine can prevent judicial entanglement in international conflicts that are more appropriately resolved through political channels. Individual litigants and the enforcement of national policies pay a price, however, for this institutional self-discipline — its application in effect means that "on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy." *Citibank*, 406 U.S. at 769 (opinion of Rehnquist, J.). For this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches

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[7] *See Underhill v. Fernandez*, 168 U.S. 250, 252 (1898); *Restatement (Revised) of U.S. Foreign Relations Law* §469 [428] comment a.

exists in a particular case. *See id.* at 775-76 (Powell, J. concurring); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3rd Cir. 1979) (courts should analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role).

The main issue raised by ETC's appeal involves the proper application of the doctrine when a litigant invokes the doctrine as a defense to a suit for damage or injury stemming from a course of events that included some acts by officials of a foreign government. *Sabbatino* and the Supreme Court's other modern act of state cases have focused on state expropriations of private property, the clearest example of a political act that, to paraphrase Justice Harlan, touches on the nerves of the international community. *See Sabbatino*, 376 U.S. at 428. This has, however, left a broad range of governmental conduct — *e.g.*, court decisions; the granting of a license, patent, or some other state monopoly; or, as in this case, the award of a construction or procurement contract — for lower courts to consider.

The appellant has advanced several objections to the district court's act of state determination. Two of these objections lack merit. First, we agree with the district court's conclusion that the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine. It is true that certain governmentally authorized acts, such as the award of a patent or the acts of a bankruptcy trustee, are considered so routine as to be not of substantial concern to the political branches in their conduct of foreign policy. *See Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3rd Cir. 1987); *Mannington Mills*, 595 F.2d at 1294. But the award of a major defense contract generally does not result from a near-mechanical exercise of narrowly-defined governmental discretion. The award of a military contract, particularly one for a major project, is usually influenced by national security considerations — considerations that are far from routine.

We also agree with the district court that the socalled "commercial" exception to the act of state doctrine — an exception endorsed by a plurality of the Supreme Court but neither acquiesced in nor rejected by a majority, *see Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) — has no application to this case.[8] Under the commercial exception's terms, a court would not abstain from deciding a case involving the purely commercial act of a sovereign or one of its instrumentalities. *See Dunhill*, 425 U.S. at 695 (plurality opinion of White, J.). To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit. *Cf. Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2nd Cir. 1984)(applying the Foreign Sovereign Immunity Act's definition of "commercial"), *cert. denied* 471 U.S. 1125 (1985); *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2nd cir. 1981)(same), *cert. denied* 454 U.S. 1148 (1982). While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental. *See Curtiss-Wright*. 694 F.2d at 302.

We part company with the district court, however, on the remainder of its act of state analysis. The district court employed a formulation of the doctrine that barred the adjudication of ETC's claims "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of the foreign policy of the United States." *ETC*, 659 F. Supp. at 1392-93. The court found that adjudication of ETC's claims would lead inevitably

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[8] In *Curtiss-Wright* 694 F.2d at 302 n.2, this court noted that the commercial exception has not been endorsed by a majority of the Supreme Court. We have no occasion here for going beyond what was said in *Curtiss-Wright*.

to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick. Because the district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government, it concluded that this case presents the type of situation which precludes judicial inquiry. *See id.* at 1393.

In reaching its conclusion, the district court relied primarily on the interpretation of the act of state doctrine advanced in a Ninth Circuit case, *Clayco Petroleum v. Occidental Petroleum*, 712 F.2d 404 (9th Cir.), *cert. denied* 464 U.S. 1040 (1984). In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental the contract after Occidental paid the minister and his son over $400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See Clayco*, 712 F.2d at 405-06. The district court dismissed *Clayco's* lawsuit on act of state grounds.

In a *per curiam* opinion, the Ninth Circuit affirmed the dismissal, concluding that the act of state doctrine barred adjudication of Clayco's claims. Although calling for a "flexible" approach to the doctrine's application, the court expressed its unwillingness to permit judicial inquiry into the motivation behind Um Al Quywayn's award of the concession. Since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the court concluded that the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See Clayco*, 712 F.2d at 407.

Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine "is not lightly to be imposed...."[9] *Mannington Mills*, 595 F.2d at 1293. In *Mannington Mills*, the plaintiff claimed that defendant Congoleum violated the antitrust laws by using patents it allegedly procured by fraud to restrict the plaintiff's trade abroad. In bringing its suit, plaintiff did not ask the court to declare the foreign patents invalid. Instead, Mannington argued that its action was concerned only with proving Congoleum's violations of United States trade regulations. *See Mannington Mills*, 595 F.2d at 1290-91.

In *Mannington Mills* this court held, through Judge Weis, that the act of state doctrine did not bar adjudication of the plaintiff's claims. The court focused on the nature of the questioned conduct — the grant of a patent, an essentially routine act that raised no serious foreign policy concerns. *See id.* at 1294. But implicit in the opinion was an unwillingness to allow litigants to shield themselves from the consequences of illegal conduct abroad by invoking the act of state doctrine as a defense in American courts. *See id.* at 1293.

What was implicit in *Mannington Mills* became explicit in *Williams v. Curtiss-Wright*. Plaintiff Williams alleged that

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[9] One commentator has noted that *Clayco* has adopted the "strict" view of the act of state doctrine favored by other courts, most notably the Second Circuit in *Hunt v. Mobil Oil*, 550 F.2d 68 (2nd Cir.), *cert. denied* 434 U.S. 984 (1977), that precludes examination of a foreign sovereign's motivations. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 357 n.190 (1986). Courts and commentators alike have criticized this interpretation of the doctrine as discouraging effective enforcement of United States regulatory policies against those who violate the law by engaging in illegal or anticompetitive conduct abroad. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied* 445 U.S. 903 (1980); *Sage International Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981); Bazyler, *supra*, at 347. This court has expressed similar concerns with too sweeping an application of the doctrine. *See Curtiss-Wright*, 694 F.2d at 304 & n.5.

defendant Curtiss-Wright monopolized the international market for a certain kind of jet engine, and claimed violations of the federal antitrust laws, as well as injury caused by common-law torts. Curtiss-Wright moved to dismiss Williams' complaint on act of state grounds, arguing that the doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied Curtiss-Wright's motion. *See Curtiss-Wright*, 694 F.2d at 301-02.

On appeal, this court, again speaking through Judge Weis, affirmed. This court rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the procurement decisions of a foreign government. Judge Weis noted that a private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government. *See id.* at 304 (citing *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)). The opinion stressed the importance of insuring that the act of state doctrine not interfere with the implementation of the policies served by antitrust and other regulatory statutes. "The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations.... " *See id.* at 304 (citations omitted). Having found that the record did not show that litigation of Williams' claims would impede the executive's conduct of foreign relations, this court held that application of the doctrine was not called for.

The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

In the instant case, the district court's dismissal was based on little more than speculation about the effect that ETC's lawsuit might have on relations between the United States and Nigeria. The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

Thus, to resolve ETC's claims on their merits, the district court would be called on simply to determine as a factual matter whether the appellees' alleged bribery of Nigerian officials motivated the award of the contract. The only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy was the letter from Legal Adviser Sofaer.[10] That official pronouncement of State Department policy, as it relates to this litigation, reads as follows:

> In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:
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> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes

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[10] Assistant United States Attorney Levy's representations at Kirkpatrick's sentencing, *supra* note 5, were not made in the course of these proceedings, were not addressed to act of state questions, and antedated the Legal Adviser's letter by nearly a year.

> judicial questioning of the *validity* or *legality* of foreign government actions....
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.
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> These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the court from adjudicating this dispute.

See Letter from Abraham D. Sofaer, Appendix to this Opinion (December 10, 1986) (emphasis in original).

In sum, the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not

be compromised by orderly federal court adjudication of ETC's lawsuit.[11] We appreciate, of course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts.[12] But the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.[13] As against that assessment, defendants

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[11] The Legal Adviser's letter does urge the court to exercise "caution and due regard for foreign sensibilities" at each stage of the litigation. In particular, the court is asked "to endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." Interpreting this passage as a failure on the part of the Legal Adviser to "sign off" completely on the act of state question, the district court dismissed the Legal Adviser's caveats with respect to the production of evidence as impractical and unconstitutional. *See ETC*. 659 F. Supp. at 1398.

The legal Adviser's expressions of concern about the possible damage to foreign relations that may result from wideranging discovery against foreign officials should not have been interpreted as a sign of ambivalence about the act of state question. Rather, the Legal Adviser simply urged the court to exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities. This advice is far from impractical. Foreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad when compared to the European version of the fact-finding process. *See* Comment, *Antitrust Suits Involving Foreign Commerce*, 135 U. Pa. L. Rev. 1003, 1013-17 (1987). American judicial insensitivity to this foreign reaction has resulted in the enactment of "blocking" laws, i.e. laws that are specifically designed to block the Federal Rules' discovery provisions. *See id.* at 1016. The State Department's advice on this matter should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the executive has become familiar.

[12] *See supra* note 6.

[13] That respect is, in our judgment, enhanced when the Legal Adviser is one who, in his former capacity as a federal judge, has addressed act of state problems with marked sensitivity and rigor in a particularly demanding context. *See Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984).

have not developed a factual record "showing that adjudication may hinder international relations ...." *Curtiss-Wright*, 694 F.2d at 304.

This litigation falls squarely within the teaching of *Curtiss-Wright*. In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts. And, finally, the defendants in each case failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine. We therefore will reverse the court's grant of summary judgment, and will remand the case for further proceedings.[14]

III.

Having found that the act of state doctrine is no bar to appellant's claims, we turn to the remaining issues presented. First, ETC argues that the district court erred in dismissing the state and federal racketeering claims. Second, ETC seeks reversal of the district court's order barring the deposition testimony of defendant Carpenter, who asserted his Fifth Amendment privilege when examined about Kirkpatrick's Air Force contract bid. Third, all of the defendants challenge the district court's determination that ETC has standing to bring its antitrust and RICO claims. And, fourth, defendant DIC reiterates its contention that it is insulated from liability for any

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[14] ETC has also argued that *Mannington Mills*' ten-factor balancing test should not result in a dismissal of the case on the basis of international comity. *See Mannington Mills*, 595 F.2d at 1297-98. Since the issue apparently was not raised below, and the record is substantially devoid of the sort of information called for by the *Mannington Mills* test, it would be inappropriate for this issue to be examined for the first time on appeal.

misdeeds of Kirkpatrick and Carpenter. We address these questions in turn.

A.

The district court dismissed ETC's state and federal RICO claims because it concluded that the amended complaint failed to allege facts establishing a pattern of racketeering activity. Noting that this court had not formulated a definition of the pattern requirement, the district court adopted a definition of pattern which would have required the appellant to allege facts establishing either (1) more than one criminal scheme undertaken by the defendants, or (2) a single, open-ended scheme. *See Environmental Tectonics v. W. S. Kirkpatrick & Co., et al.*, 659 F. Supp. 1381, 1390 (D.N.J. 1987). The district court found that ETC's amended complaint met neither prong of this test because it alleged a single scheme which was neither "continuous" nor "on-going."

The pattern requirement accepted by the district court has since been rejected by this court. In *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3rd Cir. 1987), this court held that allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, No. 87-5144 Slip Op. at 24 (March 29, 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged in the amended complaint — mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act — were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these

payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir.. 1987). But, to focus only on the series of payments — i.e., one bribe divided into four parts — is to ignore the complexity of Kirkpatrick's scheme. If the appellant's allegations are true, a European conglomerate, and two American corporations — successfully, and over a two-year period — organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3rd Cir. 1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Barticheck's* specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the

statute. ETC may proceed on its RICO claim, and — assuming, as have the district court and the parties, that the pattern requirements for the New Jersey Anti-Racketeering act are substantially similar — on its state racketeering claims as well.

B.

ETC's final ground of appeal challenges the district court's decision that the Fifth Amendment privilege against selfincrimination shielded Carpenter from responding to deposition questions the answers to which might yield evidence that Carpenter had committed crimes under Nigerian law. ETC argues that the record does not establish any significant likelihood that responding to deposition questions here would expose Carpenter to trial in the courts of Nigeria. ETC also argues that, in any event, the Fifth Amendment is not a shield against foreign prosecution.

As summarized by the court below, the evidence adduced by Carpenter to establish the risk of criminal prosecution in Nigeria was as follows:

> Prior to his deposition, Carpenter submitted an affidavit...setting forth his;reasons for fearing criminal prosecution in Nigeria and detailing the factual basis of the privilege. As discussed earlier in the opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media attention and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian contract. Akindele further warned carpenter not to travel to Nigeria and to exercise care in traveling in Europe or

> Africa because there was a risk he would be taken by force to Nigeria. In January, 1986, Carpenter's attorney was informed by a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." This information, which originally came from Interpol, was relayed to Carpenter. Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated."

The magistrate reviewed this evidence in the light of the factors relevant to the risk of foreign prosecution enumerated by the Second Circuit in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2nd Cir. 1982):

> [T]he court in resolving the issue [must focus on] whether there is an existing or potential prosecution of [the witness], what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

The magistrate found "that, by defendant Carpenter's affidavit, there is a real fear that he might involuntarily be subject to the criminal jurisdiction of Nigeria." The district court concluded that "[t]he Magistrate's decision has not been shown to be clearly erroneous or contrary to law." *ETC*, 659 F. Supp. at 1401.

We disagree. We have no doubt that the testimony ETC sought to elicit at deposition might aid in a criminal prosecution of Carpenter by Nigeria, if such a prosecution were undertaken. However, it is not contended that Carpenter, who has already pleaded guilty to the criminal charges brought by the United States, could be extradited to Nigeria for the alleged bribes. The entire risk of prosecution in Nigeria rests, therefore, on the possibility that Carpenter would be kidnapped

by Nigerian authorities; and we do not think that possibility comes close enough to being a significant likelihood to carry the day. We are prepared to assume that a real fear, substantially grounded in fact, of being kidnapped by the agents of a foreign government with a view to prosecution by that government might well justify a witness' assertion of his or her fifth amendment privilege. But the fact that Carpenter has been admonished to avoid being kidnapped does not, in our judgment, constitute substantial proof that the feared conspiracy is more than gossamer. Nothing in this record supports an inference that kidnapping foreigners not resident in Nigeria in order to bring them to trial in Nigeria is characteristic of Nigerian law enforcement personnel.

That Carpenter is sincere in his apprehension of the risk does not mean that the apprehension justifies his assertion of the privilege. "The apprehension," as the court noted in *Flanagan*, "must be a real and reasonable one, based on objective facts as distinguished from subjective...speculation." *Flanagan*, 691 F.2d at 121. And this is because, as the Supreme Court made plain in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), rejecting the Fifth Amendment claim presented there, "the privilege protects against real dangers, not remote and speculative possibilities." In short, we think the record made by Carpenter does not constitute substantial evidence of "real dangers."[15]

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[15] Carpenter might have met his burden under this standard if he had been officially warned by the United States Government to forgo traveling abroad in order to avoid capture by Nigerian agents seeking to bring him to Nigeria for trial. Other evidence -- *e.g.* a pending prosecution or the institution or threatened institution of extradition proceedings -- might also have supported Carpenter's assertion of the privilege.

The justifications that Carpenter advances in this case, however, amount to nothing more than speculation about Nigeria's intentions. First, the warnings by Benson Akindele, who does not appear to be a Nigerian official, do not, standing alone, provide a basis for Carpenter's fear of prosecution. And the somewhat ambiguous representation of

(Footnote continued)

As noted above, ETC further contends that the Fifth Amendment is only a domestic shield, which guards against self-incrimination in other American courts, whether state or federal,[16] but does not protect one from American court orders which would compel testimony that might threaten incrimination in the courts of a foreign sovereign. That issue, which the Supreme Court found unnecessary to resolve in *Zicarelli, supra,* has generated a contrariety of views in the lower courts. The Tenth Circuit, *In re Parker*, 411 F.2d 1067, 1070 (lOth Cir. 1969), *vacated as moot,* 397 U.S. 96 (1970), and the Fourth Circuit, *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986), have rejected the contention that the Fifth Amendment is extra-territorial in scope. The chief authority in support of an extra-territorial application is Judge Newman's opinion in *In re Cardassi*, 351 F. Supp. 1080 (D.Conn. 1972). *Cardassi* has been subscribed to by Judge Hufstedler, concurring in *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1169 (9th Cir. 1979), and has been followed by two district courts in this circuit. *See United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981); *United States v. Kowalchuk*, No. 77-118 (E.D.Pa. 1978).[17]

Assistant United States Attorney Steven Levy with respect to Nigeria's "vital interest" in the American prosecution of Carpenter, *supra* note 5, falls short of suggesting that Nigeria was preparing to prosecute Carpenter.

Second, what Carpenter identifies as a warning from the United States is actually something more remote. The record suggests that the Nigerian government, if interested at all in Carpenter, sought only to question him about others rather than prosecute him. Moreover, Carpenter himself was not troubled enough by the warning to stay in the United States: he later traveled to the Bahamas. To justify his invocation of the privilege, Carpenter would have had to come forward with a good deal more than he presented to the magistrate.

16 *See Murphy v. Waterfront Commission*, 378 U.S. 52 (1962).

17 The question has been discussed, but not resolved, by the District of Columbia Circuit in *In re Sealed Case*. 825 F.2d 494, 497 (D.C.Cir. 1987), and by the Second Circuit in *Flanagan*, 691 F.2d at 124.

(Footnote continued)

Because we have determined that the present record does not, in any event, present a substantial risk that Carpenter would be subject to prosecution in the courts of Nigeria, we find it unnecessary to resolve the important constitutional question as to the reach of the Fifth Amendment that would otherwise be presented

C.

On cross-appeal, defendants raise two objections to rulings by the district court. The first contention, joined in by all of the defendants, is that the district court erred in concluding that ETC had standing to press its antitrust, RICO, and New Jersey Anti-Racketeering Act claims. This argument is premised on what the defendants perceive as factual deficiencies in ETC's amended complaint. In their view, ETC has not pleaded any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the Air Force contract. The defendants also argue that ETC has pleaded no facts that would establish the payment of illegal commissions from the defendants to Nigerian government officials. The district court concluded that the amended complaint's allegations were sufficient to confer standing on ETC, and we agree with that assessment.

As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).[18] Congress enacted section 2(c), the

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[18] 15 U.S.C. § 13(c) states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or

(Footnote continued)

Act's brokerage provision, primarily to curb one particular abuse by large chain store buyers, namely the use of "dummy" brokerage fees as a means of securing price rebates. *See Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985). The section has also been applied, however, in cases that involve commercial bribery. *See id.* at 371; *see also Rangen Inc. v. Sterling Nelson & Sons. Inc.*, 351 F.2d 851 (9th cir. 1965), *cert. denied* 383 U.S. 936 (1966)(company which bribed state purchasing agent liable to competitor for state contract under 2(c).

Although this court has concluded that as a general matter commercial bribery is actionable under 2(c), it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa. *See Seaboard Supply* 770 F.2d at 372. The amended complaint alleges that Kirkpatrick paid the illegal commissions to the Akindele-controlled corporations, from which they were distributed to unnamed Nigerian officials. Though the allegation is not a detailed one, it clearly charges that illegal payments were passed from a seller to a buyer — a violation of 2(c).

Not every plaintiff who alleges an actionable claim under the antitrust laws has standing, however, to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged. *See Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours and Co.*, 826 F.2d 1235, 1240 (3rd Cir. 1987). A private plaintiff does not have to prove price discrimination to recover for a violation of 2(c), *Seaboard Supply*, 770 F.2d at 371 n.3, but the plaintiff

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intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

must still meet the standing requirements to proceed. *See Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270-72 (5th Cir. 1979).

Because of the standing doctrine's malleability, it would be difficult to define with precision the contours of the class of potential plaintiffs who have standing to assert 2(c) claims. Indeed, this court's case-by-case approach to the standing requirement argues against such an attempt. *See Alberta Gas Chemicals*, 826 F.2d at 1239-41. We need not do so in this case, moreover, because it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber. *See Cool Attic*, 587 F.2d at 271-72; *Municipality of Anchorage v. Hitachi Cable*, 547 F. Supp. 633, 640 (D. Alaska 1982); *Computer Statistics v. Blair*, 418 F. Supp. 1339, 1348 (S.D. Tex. 1976); III E. Kintner and J. Bauer, *Federal Antitrust Law* § 26.12, at 529-30 (1982).

We agree with the district court that ETC's amended complaint alleged sufficient facts to establish the kind of injury that would confer standing to bring a claim against the defendants. Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid. As the district court noted, short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from defendants' alleged violation of section 2(c).

The question of ETC's standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, ETC need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. *See Town of Kearny*, 829 F.2d at 1268 (quoting *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987)). ETC's allegations in the amended complaint of injury from the bribery scheme — a scheme that the amended complaint

charges with sufficient factual specificity — meet this standard. We also assume, as did the district court and the parties, that the New Jersey Anti-Racketeering Act's requirements are essentially the same as the federal standards.

D.

Finally, defendant DIC, one of Kirkpatrick's corporate parents, contends that the it is entirely immune from liability. ETC claims that liability for the alleged wrongful acts of the Kirkpatrick group can be imputed to DIC on either of two theories: by piercing the defendant's corporate veil, *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986), or by finding that Carpenter acted as DIC's agent in carrying out the bribery scheme, *Japan Petroleum Co. v. Ashland Oil*, 456 F. Supp. 831 (D. Del. 1978). The district court found that the amended complaint minimally alleged "a relationship among [DIC], IDC, Carpenter, and Kirkpatrick sufficient to support the potential imposition of liability upon [DIC] or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick." *ETC*, 659 F. Supp. at 1388. The court also concluded that ETC and the defendants should have the opportunity to proceed with discovery so that the facts defining the relationship of DIC, IDC, Carpenter and Kirkpatrick may be fully developed. *See id.* at 1389. We find no reason to question such a course, which should produce a record on the basis of which the question of DIC's liability can be properly determined. *See Craig v. Lake Asbestos of Quebec, Ltd.*, No. 87-1254 (3rd Cir. March 31, 1988).

Conclusion

We therefore will reverse the district court on its act of state decision, its dismissal of plaintiff's RICO and Anti-Racketeering Act claims, and its affirmance of the magistrate's decision upholding Carpenter's assertion of the Fifth Amendment privilege. As to the other issues, we will affirm the district court. We will remand this case for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

(Appendix to Opinion of Judge Pollack)

December 10, 1986 Letter to Abraham D. Sofaer to the Hon. Alfred J. Lechner, Jr. is reproduced at A-267-269.

Public Servant taking Gratification in Respect of Official Act

Whoever

(i) being or expecting to be a public servant

(ii) accepts or obtains or agrees to accept or attempts to obtain

(iii) from any person

(iv) for himself or for any other person

(v) any gratification whatever, whether pecuniary or otherwise, other than lawful remuneration

(vi) as motive or reward

(*a*) for doing or forbearing to do any official act

or (*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person

or (*c*) for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant as such

shall be punished with imprisonment which may extend to seven years (N.N.) [*three years* (Sudan)] or with fine or with both; if such public servant is in the service of the Government of the Northern Region or the Government of the Federation in a judicial capacity or carrying out the duties of a police officer, with imprisonment which may extend to fourteen years or with fine or with both.

If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office and that he will serve them, he may be guilty of cheating but he is not guilty of the offence under this section (expln. 1).

A public servant, who receives a gratification as a motive for doing what he does not intend to do or as a reward for what he has not done, is guilty of an offence under this section (expln. 2) (s. 115, N.N., 128, Sudan P.C.).

Public servant

See commentary to section 10, N.N., 14, Sudan P.C. at page 22.

A public servant does not cease to be a public servant because he is on leave.[10] A police officer posted to a particular police station does not cease to be a public servant when he is dealing with a person residing in the territorial jurisdiction of another police station.[11]

Expecting to be

It must be proved that the offender gave the other party to the transaction reason to believe that he was about to become a public servant and that he himself also believed it. If he did not expect to become a public servant but obtained a gratification from another by deceiving that other into believing such to be the case, he would not be guilty under this section but he would be guilty of cheating.[12]

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10 *Venkatasubbiah*, In *re-*, A.I.R. [1948] Mad. 68.

11 *Maxbooluddin* v. R., A.I.R. [1950] All. 5.

12 Expln. 1.

Accepts, obtains, agrees to accept or attempts to obtain

The public servant who obtains or agrees to accept or attempts to obtain a bribe is the only person punishable under this section. If A offers a bribe to a public servant, who refuses it, A is not punishable for abetment of the offence defined in this section but under section 118, N.N., 131, Sudan P.C. Merely asking for a bribe is an attempt to obtain it.[13] It is not necessary to prove how the bribe was demanded or obtained, if it was, in fact, obtained.[14] It is no defence that payment of the bribe was postponed.[15]

For any other person

The person for whom the gratification is obtained or sought need not be a public servant. A, a magistrate, obtains from Z, a merchant, a situation in Z's office for A's brother, B, as a reward for deciding a case in Z's favour: A is within the section.[16] If B is aware of the transaction between A and Z, R is punishable under section 121, N.N., 134, Sudan P.C.

Taking Gratification in Order to Influence Public Servant

Whoever

(i) accepts or obtains or agrees to accept or attempts to obtain from any person

(ii) for himself or any other person

(iii) any gratification whatever, whether pecuniary or otherwise

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13 *Emp.* v. *Baldeo Sahai*, (1879) I.L.R. 2 All. 258.

14 *Tapeshri Prasad* v. *Emp.*, A.I.R. [1947] All. 84.

15 *Indra Nath Benerjee* v. *E. G. Rooke*, (1909) 14 C.W.N. 101.

16 Ill. (*a*).

(iv) as a motive or reward for inducing, by corrupt or legal means, any public servant

(*a*) to do or forbear to do any official act

or (*b*) in the exercise of the official functions of such public servant to show favour or disfavour to any person

or (*c*) to render or attempt to render any service or disservice to any person with any department of the public service or with any public servant as such

shall be punished with imprisonment for a term which may extend to three years or with fine or with both (s. 116, N.N., 129, Sudan P.C.).

An official may himself be uncorruptible but his wife, servants, relations and even his friends may take advantage of his position to secure bribes by professing ability to influence him in the exercise of his official functions. This section is particularly directed against such persons. If one public servant acts as an agent of another public servant to solicit or receive bribes on behalf of the latter, he is punishable under the preceding section.

A pleader who receives a fee for arguing a case before a public servant and a person who for a fee prepares a memorial for presentation to a public servant urging him to do something for the benefit of the payer in the exercise of the public servant's official functions is not within the section, because neither of them intends to use corrupt or illegal means to influence the public servant. But if a pleader takes a sum of money from a client for presentation to a judge as an inducement to the judge to decide in the client's favor, he is within the section.

Abetment by Public Servant of Taking Gratification in Order to Influence Him

Whoever

(*a*) being a public servant in respect of whom an offence under section 116, N.N., 129, Sudan P.C. is committed

(*b*) abets the offence

shall be punished with imprisonment which may extend to three years or with fine or with both (s. 117, N.N., 130, Sudan P.C.).

This is a special provision for abetment of the offence of taking an illegal gratification, when the person who takes or agrees to take or asks for a bribe is not a public servant but he is abetted by a public servant. This section does not apply when the public servant himself accepts or agrees to accept or asks for a bribe. The abetment may be in any of the ways mentioned in section 83, N.N., 84 Sudan P.C., by instigation, conspiracy or intentional aid.

In India officials who were habitually corrupt usually employed their wives or servants to solicit and receive bribes, so that it was sometimes difficult to prove the connection between the public servant and the person who solicited or accepted the bribes. If the public servant knowingly enjoys the benefit of gratifications received by such persons, that is evidence pointing to the conclusion that he is guilty under this section.

Offering or Giving Gratification to a Public Servant

Whoever

(*a*) offers or gives or agrees to give

(*b*) any gratification whatever, pecuniary or otherwise

(*c*) in the circumstances and for any of the purposes mentioned in sections 115 or 116, N.N., 128 or 129, Sudan P.C.

shall be punished with imprisonment which may extend to three years or with fine or with both (s. 118, N.N., 131, Sudan P.C.).

In the Indian Penal Code there is no corresponding section. This is for the specific psychological purpose of emphasising that when a public servant is bribed, whether he solicited the bribe or not, he is the person primarily liable. The result is that, in India, if a bribe is offered and accepted, the giver is liable for abetment under the section corresponding to sections 115, N.N., 128, Sudan P.C. or 116, N.N., 129, Sudan P.C., read with section 85, N.N., 84, Sudan P.C.; if the bribe is not accepted, the offer/or is liable under the sections corresponding to section 115, N.N., 128, Sudan P.C., or 116, N.N., 129, Sudan P.C., read with section 92, N.N., 91, Sudan P.C. But in Northern Nigeria and the Sudan the person who offers or gives a

Third Party Profiting by Gratification

Whoever

(*a*) knowingly

(*b*) profits

(*c*) by any gratification or benefit

(*d*) obtained in any of the circumstances mentioned in sections 115, 116 or 119, N.N., 128, 129 or 132, Sudan P.C.

(*e*) but does not take any active part in obtaining such gratification or benefit

shall be punished with imprisonment which may extend to one year or with fine or with both (s. 121, N.N., 134, Sudan P.C.).

The bribe taker, when a public servant himself, is dealt with in sections 115 and 119, N.N., 128 and 132, Sudan P.C.; when he is a layman, in section 116, N.N., 129, Sudan P.C. The public servant who employs another to solicit and accept bribes is dealt with in section 117, N.N., 130, Sudan P.C. The offeror or giver of a bribe is dealt with in sections 118, 120, N.N., 131, 133, Sudan P.C. This section deals with the person who neither solicits, takes, gives, offers nor takes an active part in the transaction, but who knowingly benefits by it.

If Z, a banker, gives B, the brother of A, a post in Z's bank, in consideration of A deciding a suit in Z's favour and B accepts the post, knowing of the transaction, B is within the section. If A, a collector of taxes, whose duty it is to assess taxes payable from time to time by Z, a merchant, takes a lease of a house from Z at an inadequate rent, and A's wife, W, knowing these facts, resides in the house with A, W is within the section

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No. 87-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— vs. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the act of state doctrine bar adjudication of an action which requires the court to determine whether an award of a military contract by the Nigerian government resulted from the payment of bribes to high level government officials and whether it is the custom or practice of the Nigerian government to demand such payments?

PARTIES TO THE PROCEEDINGS BELOW

A description of the parties to the proceeding below was fully discussed in the petition for writ of certiorari.

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JURISDICTION

The United States Court of Appeals for the Third Circuit entered its order on May 2, 1988, reversing the decision of the district court dismissing the complaint. A timely petition for a writ of certiorari was filed on June 17, 1988. This Court granted the petition for a writ of certiorari on June 26, 1989. Petitioners allege jurisdiction under 28 U.S.C. § 1254(1) (1966 and Supp. 1989).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

The following constitutional and statutory provisions are implicated in this case:

1. United States Constitution, Art. III.

2. The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(2), which states:

> (a) Prohibited Practices. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934 [15 USC §78dd-1], or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer,

gift, promise to give, or authorization of the giving of anything of value to –

• • •

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of –

(A) influencing any act or decision of such party, official, candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business, to any person.

3. The Robinson-Patman Act, 15 U.S.C. § 13(c), which states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

4. The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(b), (c) and (d), which states:

> (b) It shall be unlawful for any person through a pattern or racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

5. The New Jersey Anti-Racketeering Act, N.J.S. 2C:41-2, which states:

> a. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce.

6. The judicially-created act of state doctrine.

STATEMENT OF THE CASE

Factual Background

In 1982, a New Jersey corporation, W.S. Kirkpatrick & Co., Inc. ("Kirkpatrick"), through a subsidiary, W.S. Kirkpatrick & Co., International ("Kirkpatrick International"), entered into a contract with the Federal Republic of Nigeria to provide aeromedical equipment and to develop an aeromedical center at the Kaduna Air Force Base in Kaduna, Nigeria. The contract was awarded to Kirkpatrick International by the Ministry of Defense of the Nigerian government. (A. 81-117)

In approximately 1984, the United States Department of Justice commenced a grand jury investigation into the circumstances surrounding the grant of the contract. Kirkpatrick, which was then under new management, cooperated with the Government's investigation. Indeed, Kirkpatrick uncovered evidence which showed that an agent hired by its prior management, Benson "Tunde" Akindele ("Akindele"), had represented to Kirkpatrick that Nigerian officials demanded that Kirkpatrick pay bribes to them in order to be awarded the contract. Two interoffice memoranda, the first dated March 30, 1981, the second dated March 8, 1982, (the "Memoranda") (A. 212-222) showed that Akindele told Kirkpatrick's former chairman that Kirkpatrick should be prepared to pay a sales commission totaling twenty percent (20%) of the contract price. The commission would be distributed among Nigerian political and military officials as follows: 5% for the Nigerian Air Force, 5% for the political party, 2 1/2% for the medical group, 2 1/2 % for a cabinet minister, 2 1/2% for other defense personnel, and 2 1/2 % for Akindele. (A. 221) The Memoranda noted that Akindele had explained that Nigerian officials usually demanded and expected such payments from contract bidders. (A. 213 and 219) Faced with these demands, Kirkpatrick's former management apparently agreed to make payments to Akindele with the understanding that he would cause bribes to be paid to representatives of the Nigerian government.

Kirkpatrick and its former chairman, Harry Carpenter, each pled guilty to one count of violating the Foreign Corrupt Practices

Act, 15 U.S.C. § 78dd-2 ("FCPA"). The company was sentenced to a fine of $75,000 to be paid over a period of five years. (A. 52) Mr. Carpenter was sentenced to a fine of $10,000 and 200 hours of community service. (A. 31) Since the mere offer of payment or agreement to pay alone violates the FCPA, the prosecution against Kirkpatrick's chairman involved a carefully worded offer of proof which did not establish that any bribes were actually paid to anyone, only that the former chairman intended to pay a bribe.

At the sentencing of Kirkpatrick, the Government expressed its concern about the potential political impact of the case:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case [sic] cannot be underestimated . . . . I can say that the [G]overnment of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the [G]overnment of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government, your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the Government of Nigeria actually knew who was involved in this scheme. . . .[1]

(A. 45)

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[1] The Assistant United States Attorney also advised the court that the proposed recipients of the bribes included very prominent military figures still in power in Nigeria.

The Civil Action

Following the conclusion of the criminal action, Environmental Tectonics Corporation ("ETC") brought this action in United States District Court for the District of New Jersey and, on July 14, 1986, filed an amended complaint (the "Complaint"). (A. 54-120) ETC alleged jurisdiction based upon 18 U.S.C. § 1964, 15 U.S.C. § 15 and principles of pendent jurisdiction. (A. 58) ETC claimed violations of the Robinson-Patman Act, 15 U.S.C. § 13(c),[2] the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C §§ 1962(b), (c) and (d), and the New Jersey Anti-Racketeering Act, N.J.S. 2c:41-2.

The Complaint against Kirkpatrick and Kirkpatrick International[3] alleged that ETC had submitted a bid for the contract and that ETC would have been awarded the contract but for defendants' payment of bribes.[4] The Complaint also alleged that

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[2] Although not raised in Kirkpatrick's motion to dismiss, it is unclear how the facts in this case support a Robinson-Patman Act violation. *See May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214-16 (9th Cir. 1980) (Section 13(c) did not apply where dominant nature of transaction was for services, not goods); *see also Advanced Office Sys. v. Accounting Sys. Co.*, 442 F. Supp. 418, 421-24 (D.S.C. 1977) (cases discussing definition of 'goods, wares and merchandise' under section 13(c)); *see generally* DiSabatino, *Robinson-Patman Act: Commissions*, 42 A.L.R.Fed. 276 (1978 and Supp. 1988).

[3] Nine other defendants were named: D.I.C. (Holding) Inc. is the parent of Kirkpatrick and Kirkpatrick International; Industrial Development Corporation, SA, is the parent of D.I.C. (Holding) Inc.; Harry G. Carpenter was the Chairman of the Board of Directors and Chief Executive Officer of Kirkpatrick; Robert H. Edwards was the President of Kirkpatrick; Benson "Tunde" Akindele was hired as a local agent and acted on behalf of Kirkpatrick in Nigeria; John M. Krankel was Secretary and Treasurer of Kirkpatrick; Emro Engineering Co., Inc., a subcontractor, designed the equipment sold to Nigeria and provided engineering services on the project; Robert W. Ruppert was the President and Chief Executive Officer of Emro; Ross E. Saxon was Chairman of the Board of Directors and Chief Executive Officer of Nautilus Environmentals, Inc., another subcontractor.

[4] ETC did not allege that it was the only other bidder for the contract. Indeed, there is evidence that there were at least two other bidders. *See* Memoranda.

(footnote continued)

in order to obtain the Kaduna contract defendants had agreed to pay and had paid a single bribe in a series of installments through an intermediary, Akindele, for distribution to certain unnamed Nigerian officials. (A. 63-64)

Kirkpatrick and several other defendants moved to dismiss the original complaint,[5] alleging, *inter alia*, that the action was precluded by the act of state doctrine. Kirkpatrick argued that adjudication of this action would require an inquiry into bribery and corruption of the Nigerian government. It was further argued that the litigation would require the court to interject itself into the workings of a foreign government.

Specifically, Kirkpatrick contended that this action could not be heard without adjudication of whether the Nigerian government officials were paid bribes by Kirkpatrick's agent, Akindele. The criminal action did not reach that issue because, under the Foreign Corrupt Practices Act, the mere payment of money to Akindele with the understanding that he would pay bribes constituted a violation. Second, Kirkpatrick argued that this action would necessarily involve proof as to the identity of the individual

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(A. 213) Further, ETC did not allege that its bid was the lowest bid, or even that its bid was lower than Kirkpatrick's bid. *See* Complaint. (A. 54-120) Although discovery was stayed by the district court and therefore it is not in the record, it is believed that the evidence will show Kirkpatrick's bid, including the alleged illegal payments, was lower than ETC's bid.

[5] Prior to filing the Complaint, plaintiffs served three sets of interrogatories and requests for documents upon Kirkpatrick. The district court ordered on March 12, 1986 an accelerated discovery schedule. During discovery, ETC obtained certain documents and interrogatory responses from defendants Kirkpatrick, Carpenter and D.I.C. Holdings. ETC also took the deposition of Kirkpatrick's former chairman, Harry Carpenter, where Carpenter asserted the Fifth Amendment because of Nigeria's continued interest in the case. Kirkpatrick filed its motion to dismiss on May 2, 1986, after which all discovery was stayed on May 30, 1986. However, plaintiff did file the Complaint on July 14, 1986. The district court asked the parties to brief specific questions on the act of state issue, (A. 135-37) and because the court considered the parties' additional submissions, the court turned Kirkpatrick's motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 56.

officials and representatives who allegedly accepted bribes and of all the specifics of the bribery. In the criminal prosecution, such specific information was superfluous since there was no need to prove that a bribe was actually ever paid. Third, Kirkpatrick argued that this action, unlike the criminal action, would adjudicate whether demanding and receiving bribes is customary to the Republic of Nigeria. This issue cannot be avoided since, in order for ETC to prove causation, ETC would have to prove that it would have been awarded the contract without paying a bribe. A primary defense of Kirkpatrick would be to show that bribes are commonly extorted by Nigerian government officials and that in order to do business with the Nigerian government, bribes must be paid to its officials and representatives. Thus, defendants would necessarily attempt to prove that ETC would have been forced to pay a similar bribe in order to be awarded the contract.

In considering the act of state issue, the district court invited the Department of State to comment on whether it objected to adjudication of this action on foreign relations grounds. The State Department responded by letter (the "Sofaer Letter") (A. 267-69), stating that adjudication required caution and due regard to foreign sovereign sensibilities and could prove detrimental to foreign relations with Nigeria. (A. 269) However, the letter also stated, in contradiction to its cautions, that the State Department adopted the position of the Solicitor General, as expressed in its amicus briefs to this Court in *Industrial Investment Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), and in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) that adjudication was not barred by the act of state doctrine to the extent that judicial inquiry delved only into the motivations of the Nigerian government's decision to award the contract and not into the legality of the award. (A. 267-68) The district court determined that the Sofaer Letter provided no guidance as to whether the action should proceed. (A. 307)

While the district court awaited a response from the State Department, counsel for ETC wrote to the Nigerian Embassy

in Washington, D.C. seeking a statement that the Nigerian government had no objection to adjudication of this action. (A. 124-126) The Republic of Nigeria did not respond to ETC's request. Nor has the Nigerian government ever sought to invalidate the contract or take any action against Kirkpatrick (A. 173) and in fact performance under the contract continued and was almost complete at the time this case was before the district court. (A. 174-75)

The Decisions

The district court dismissed the case as barred by the act of state doctrine (hereinafter the "District Court Opinion") (A. 277-315), stating that ETC could not prove its claims without establishing that the Nigerian officials violated Nigerian law by accepting payment of a bribe: "[r]esolution of these critical issues necessarily requires judicial inquiry into the acts of the Republic of Nigeria, its officials or its representatives and, as well, may affect the conduct of foreign policy of this country." (A. 296) The district court found an "indispensible ingredient" of ETC's claims requires "establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law." (A. 298) The Court concluded that the establishment of corruption by high Nigerian Government and military officials "necessarily implies a criticism of the Republic of Nigeria." (A. 298) The district court found the State Department's comments to be inconclusive because the court could not hear the case and heed the State Department cautions to limit discovery without compromising its judicial role. (A. 305)

The Third Circuit reversed and remanded the case, finding *inter alia*, that the act of state doctrine was not a bar to ETC's claims because (1) ETC's claims only require an inquiry into the motivations behind, rather than the legality of, the Nigerian government's acts, and (2) defendants failed to prove that the litigation would cause a demonstrable threat to foreign relations (hereinafter the "Third Circuit Opinion").[6] (A. 317-346) In its

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[6] The Third Circuit, in remanding the case to the district court, also found that the Complaint had sufficiently alleged a pattern of racketeering activity under RICO and standing to sue under the Robinson-Patman Act.

opinion, the court acknowledged that the award of the contract was a sufficiently formal expression of sovereign interests to trigger the act of state doctrine (A. 327) and that such an award does not fall within a commercial exception since the decision must have involved national security concerns that "are far from routine." (A. 327) However, the Third Circuit found that adjudication of ETC's claims would simply require a factual determination of whether the Nigerian officials were motivated by a bribe in awarding the Kaduna contract and that the act of state doctrine did not foreclose judicial scrutiny of the motivations behind an act of state. (A. 331-32) Further, the court found, based on the Sofaer Letter, that the conduct of American foreign policy would not be threatened by adjudication of ETC's lawsuit. (A. 333-34)

Kirkpatrick petitioned this Court for a writ of certiorari which this Court granted on June 26, 1989, limited to the act of state issue.

SUMMARY OF THE ARGUMENT

The Third Circuit erred in declining to apply the act of state doctrine to this case. In addition to reaching the wrong conclusion, the Third Circuit analyzed the act of state issue by applying a standard which this Court has never recognized as the proper approach to act of state questions. This Court should reverse the Third Circuit's erroneous holding and take this opportunity to guide the lower courts back to a flexible approach to the act of state doctrine which balances the various considerations raised on a case-by-case basis.

I.

The Third Circuit reasoned that the act of state doctrine did not apply to bar ETC's claims because adjudication did not require a determination of the validity of the contract award to Kirkpatrick, but rather only an inquiry into the motivations behind the Nigerian government's act. In fact, the validity of the Nigerian government's award is at issue because in order for ETC to prevail it must prove its direct injury by showing that it would have been awarded the contract but for the Nigerian government's demand and acceptance of a bribe.

Even if the validity of the award were not in issue, the Third Circuit has narrowed the act of state doctrine by applying a distinction between cases which require inquiry into the motivation behind a foreign sovereign's act of state and those cases which require a determination of the validity of the foreign sovereign act of state. The motivation-validity distinction is not supported by this Court's decisions and is inconsistent with this Court's flexible approach to the doctrine as set forth in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Further, the distinction is not a meaningful one in many factual contexts, including in this action, where motivation and validity are not separable.

The Third Circuit, without supporting analysis, also made reference to public policy considerations as another ground for rejecting application of the act of state doctrine in this case. However, public policy interests do not require rejection of the doctrine in this case since those interests are protected by the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 *et seq.* (the "FCPA"), which provides for government regulation of foreign bribes. Nor does the fact that there was a criminal prosecution under the FCPA suggest an exception to the doctrine. To the contrary, United States regulatory objectives as set forth in the FCPA are met through government enforcement, as in this case, and Congress made no provision for a private right of action under this statute.

II.

In resolving Kirkpatrick's act of state defense, this Court should apply the flexible case-by-case approach to the doctrine articulated in *Sabbatino*. Consideration of the several factors raised by this case including the need to determine the motivation and validity of the contract award, dictates application of the doctrine.

First, the award of the military contract at issue here is an official sovereign act of the kind traditionally protected by the act of state doctrine. It is neither ministerial nor commercial in nature but is a fundamental sovereign act bearing upon the foreign sovereign's national security.

Second, because this lawsuit cannot be resolved by discoverable and manageable standards and raises policy issues beyond the proper function of the judiciary, ETC's claims cannot be decided by our courts. The court cannot and should not inquire into the process by which the Nigerian government awarded the military contract to Kirkpatrick nor can the court, if it finds the contract was invalidly granted, determine to which other bidder, if any, the Nigerian Government would have awarded the contract. The need to resolve these issues, which raise political question considerations and principles of comity, warrants application of the act of state doctrine to this case.

Third, the position of the State Department is not controlling, even when it is clear and unambiguous that a lawsuit presents no foreign policy concerns, which was not the State Department's position in this case. Six Justices of this Court rejected the *Bernstein* exception in *Citibank*, as did this Court in *Sabbatino*. The judiciary should not abdicate its responsibility to determine the justiciability of a case. Further, the position of the Executive has been erratic both in its views of the doctrine generally and in its representations concerning the international political implications of the sovereign acts at issue in this case. Indeed, the very ambiguity of the State Department's position, by vacillating in this case, demonstrates the wisdom of judicial decision-making in act of state matters. Moreover, the political question considerations raised by this case have always been the exclusive jurisdiction of the judiciary. Thus, in the final analysis it is appropriate for the judiciary to determine the applicability of the act of state doctrine.

ARGUMENT

I

THE JUDICIALLY-CREATED DISTINCTION BETWEEN MOTIVATION AND VALIDITY SHOULD NOT BAR APPLICATION OF THE ACT OF STATE DOCTRINE TO THIS CASE

Although no opinion of this Court appears to support the proposition, some lower courts have distinguished between cases which require a determination of the validity of an act of state and those which require only a determination of the motivation behind an act of state.[7] In this case, the Third Circuit determined that adjudication of ETC's claims would only require inquiry into the motivation behind the Nigerian government's award of a military contract to Kirkpatrick and would not require a determination of the validity of that contract. The Third Circuit found the act of state doctrine inapplicable, holding that the doctrine does not apply to actions in which the motivation but not the validity of a foreign government's sovereign acts are at issue. (A. 332) In doing so, the court relied upon prior decisions in the Third Circuit which it believed had similarly used a motivation-validity distinction to find the act of state doctrine inapplicable. *See Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Decisions in other lower courts, including the Ninth and Second Circuits, have rejected the distinction. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 303 (1988); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Hunt v. Mobil*

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[7] This Court has held that the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (hereinafter "Citibank").

Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *Cf. Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

The Third Circuit erred in its refusal to apply the act of state doctrine to this case. First, adjudication of ETC's claim does require a determination of the validity of the military contract awarded to Kirkpatrick by the Nigerian government. Second, the validity-motivation distinction used by the Third Circuit is inappropriate as a rule to limit application of the act of state doctrine and is inconsistent with the flexible case-by-case approach which this Court enunciated in *Sabbatino*, 376 U.S. at 428. Third, the Circuit Court's stated policy reasons for not applying the act of state doctrine – that it inhibits enforcement of United States regulatory interests – should not preclude application of the doctrine to foreign bribery cases.

1. *The Validity of the Nigerian Government's Contract Is at Issue in this Case*

The Third Circuit erroneously concluded that the legal validity of the Nigerian government's act in awarding the military contract to Kirkpatrick is not at issue in this case. It reached this conclusion by finding that ETC "does not seek to have the Air Force contract invalidated."[8] (A. 332) While ETC does not seek

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[8] The court also based its conclusion on the fact that ETC was not seeking compensation from the Nigerian government and that no Nigerian official was named as a defendant. Third Circuit Opinion. (A. 332) The fact that neither the foreign sovereign nor any of its officials is named in the complaint has never been dispositive of whether the validity of an act of state is at issue for purposes of determining the doctrine's applicability. *See O.N.E. Shipping*, 830 F.2d at 452 (the act of state doctrine applies "regardless of whether the foreign government is named as a party to the suit"); *Clayco*, 712 F.2d at 407 (the conclusion that judicial scrutiny would embarrass the political branches of our government in the conduct of foreign policy "is unaffected by the fact that the ruler was not named as a party"); *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ("[the] private litigant may raise the act of state doctrine, even when no sovereign state is a party to the action. The act of state doctrine is apposite whenever federal courts must question the legality of the sovereign acts of foreign states") (citations omitted).

a declaratory judgment that the Nigerian government's award of the contract is invalid, the practical effect of the factual findings necessary for ETC to prevail in its claim for damages is to find the contract invalid on the basis of the illegal acts of Nigerian government officials. ETC must prove that a bribe was actually paid to one or more Nigerian officials and that the bribe caused the Nigerian government to award the contract to Kirkpatrick. ETC must also prove that but for the payment of the bribe, the Nigerian government would have awarded the contract to ETC and that it would have done so without the payment of a bribe. It is this factual finding which gives rise to plaintiff's claim of injury. Therefore, plaintiff's claim necessarily depends upon finding invalid the contract award to Kirkpatrick. If the validity of the Nigerian government's award to Kirkpatrick is assumed, as it must be under the act of state doctrine, *see Dunhill*, 425 U.S. at 695, *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (S.D.N.Y. 1984) (Sofaer, J.), there is no basis for an award of damages to ETC.

Further, one element of proof in this case will be whether the practice in Nigeria is to demand payments such as Kirkpatrick made.[9] ETC will presumably seek to prove it would have obtained the contract without the payment of a bribe and Kirkpatrick

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[9] There is evidence to this effect because Kirkpatrick's former management was told by Akindele that the Nigerian government expected a 20 percent payment in connection with the award of government contracts. *See* Memoranda. (A. 213 and 219) Further, it is recognized that in many parts in the world, particularly in developing countries, bribery of foreign governments is a standard, customary and accepted method of doing business, even though such a practice may be contrary to the stated policies of those governments. *See, e.g.*, Maurice, *Questionable Overseas Payments: Going Around One More Time*, 15 Gonzaga L. Rev. 459, 462 (1980). *Cf. Hatzlachh Supply Inc. v. Savannah Bank of Nigeria*, 649 F. Supp. 688, 692 (S.D.N.Y. 1986) (plaintiff argued against moving case to Nigeria, on forum non-conveniens grounds, by arguing that Nigeria could not provide an adequate forum because of purported corruption there, citing a CBS "60-Minutes" broadcast in which Lagos, the capital of Nigeria, is described as lawless and corrupt); *SEC v. International Tel. & Tel. Corp.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,586 (case involving alleged failure to disclose questionable payments in order to obtain business from, among other countries, Nigeria).

will seek to prove that the Nigerian government would not have awarded the contract to ETC without the same payment Kirkpatrick was required to make. Since bribery and the acceptance of a bribe by a government official are illegal acts under Nigerian law, *see* Third Circuit Opinion, n. 4 (A. 322); Nigerian Penal Law (A. 348), a determination that bribery caused the Nigerian government to award the contract to Kirkpatrick could not be made without finding that certain Nigerian officials committed illegal acts. Thus, this case will require a judicial determination of whether the Nigerian government was corrupted in this case and whether it is the practice of the Nigerian government to act in this corrupt fashion.

A determination that a foreign sovereign's act is invalid under its own laws may be presumed to cause embarrassment and interference with the conduct of foreign affairs. As this Court observed in *Sabbatino* "[a]n inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongfully made, would be likely to be highly offensive to the state in question." 376 U.S. at 415, n.17. Here, since the court would need to determine that ETC should have been awarded the contract and thereby to invalidate the award of the contract to Kirkpatrick, adjudication of this case would necessarily require just such an offensive inquiry.[10] In reaching its conclusion that "adjudicating [ETC's] claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts," (A. 335) the Third Circuit failed to analyze the facts and context of this case. Its conclusion is simply erroneous when the issues raised by this case are analyzed.

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[10] The district court recognized that adjudicating this case would cause embarrassment to the Nigerian government: "[p]roof by ETC requires, as mentioned, establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria . . . ." (A. 306)

2. *The Motivation-Validity Distinction Used by the Third Circuit Is Not an Appropriate Guide to Application of the Doctrine*

Even if the validity of the Nigerian contract did not need to be determined here, the motivation-validity distinction used by the Third Circuit should not be used as a rule to limit application of the act of state doctrine because it does not have broad application to different facts and circumstances, as analysis of the cases in this Court as well as in the lower courts reveals. The issue of motivation arises in many different legal and factual contexts so that a rule prohibiting application of the act of state doctrine to cases requiring inquiry into the motivation behind a foreign government's act does not have the flexibility necessary to meet the myriad of situations which may arise. At most, therefore, the extent to which judicial inquiry will determine or touch upon the validity of, and motivation behind, a foreign act of state should be one of a number of factors considered by courts in determining the applicability of the doctrine to a particular case. *See infra*, point II.

(a) *No Decision of this Court Supports the Distinction*

This Court has found that a flexible approach should be taken toward the act of state doctrine so that it may be applied as necessary on a case-by-case basis. *See Sabbatino*, 376 U.S. at 428; *Citibank*, 406 U.S. at 763. The motivation-validity distinction, as applied by the Third Circuit, is inconsistent with that principle. No case decided by this Court has ever permitted our courts to find the act of a foreign sovereign invalid, with a few carefully carved out exceptions not applicable here, let alone a direct finding of illegal conduct by a foreign government as would be required in this case. In those cases where this Court has considered application of the act of state doctrine in the context of plaintiffs' assertion of antitrust violations[11] the decisive consideration

[11] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

appears to have been the extent to which the conduct of the foreign government was involved in plaintiffs' claims; in the antitrust cases where this Court rejected the act of state doctrine, the conduct of the defendant, and not the act of the foreign sovereign, was at the crux of the plaintiffs' allegations.

In *American Banana*, this Court applied the act of state doctrine where plaintiff alleged that the anticompetitive conduct of the defendant had caused Costa Rica to seize plaintiff's property. Although one aspect of the Court's opinion, that the antitrust laws do not reach conduct outside the United States, has been subsequently discredited, this Court has never reversed its position that both the validity of as well as the motivations behind a foreign sovereign's acts are immune from judicial scrutiny:

> The fundamental reason is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad.

213 U.S. at 358. Therefore, it appears from this Court's decision in *American Banana* that the act of state doctrine bars inquiry into the motivation behind, as well as the validity of, the sovereign acts of a foreign government.

Although this Court's decisions in *Sisal Sales* and *Continental Ore* make clear that the antitrust laws apply when actions outside the United States have an anticompetitive effect within the United States, neither *Sisal Sales* nor *Continental Ore* involved the need to make judicial findings directly relating to the foreign government's sovereign act. Unlike *American Banana*, in *Sisal Sales* this Court allowed the United States Government to secure an injunction against defendants, who had allegedly conspired and unlawfully acted to control the importation and sale of sisal from Mexico. The Court found defendants' conduct was not protected by the doctrine applied in *American Banana* because the Government complained of a violation of United States laws

within the United States by parties subject to its jurisdiction "not merely of something done by another government at the instigation of private parties." *Sisal Sales*, 274 U.S. at 276. However, unlike what would be required in this case, the Court in *Sisal Sales* found there was no need to make any factual or legal findings relating to the foreign legislation but only to defendants' conduct (although the defendants were aided by discriminating legislation). *Id.* at 276.

In *Continental Ore*, this Court upheld an antitrust complaint alleging that defendants, suppliers of vanadium, a metal product, conspired to monopolize the market in vanadium in Canada to the exclusion of plaintiffs; the Canadian government was indirectly involved in plaintiffs' claims because of legislation which allowed an agent of the government to control the purchase of vanadium. However, since plaintiffs did not question the validity of any action taken by the Canadian government or its agent, this Court found that the defendants' acts were not protected by the fact that their conduct "involved some acts by the agent of a foreign government." 370 U.S. at 706. In reaching its decision, this Court specifically observed that there was no indication that any Canadian government official "approved or would have approved" of the alleged monopolization. *Id.*[12]

Thus the decisions in *Sisal Sales* and *Continental Ore* were not predicated upon a distinction between validity and motivation

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[12] Although some courts have doubted that the holding of *American Banana* survived *Sisal Sales* and *Continental Ore*, others have disagreed. *Compare Mitsui*, 594 F.2d at 52-54 (doubting *American Banana*) *with Hunt*, 550 F.2d at 73-75 (finding *American Banana* still viable in part) and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 109-110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (hereinafter *Occidental Petroleum*)(same). In *Sabbatino*, this Court cited *American Banana* as a case supporting the principles of *Underhill*. 376 U.S. at 416. *American Banana* can plainly be distinguished as a case more directly involving the acts of a foreign government. In fact, although *American Banana* is generally compared with this Court's consideration of the act of state doctrine in the context of antitrust claims, the case is more closely aligned with this Court's consideration of the doctrine in the context of foreign expropriations.

but upon the minimal government involvment and the lack of necessity to scrutinize *any* governmental act. This case, unlike *Sisal Sales* or *Continental Ore*, would require a judicial finding that officials of the Nigerian government accepted a bribe, the bribe caused the government to award the military contract to Kirkpatrick, and the contract should have been awarded to ETC.

Nor do the three cases in which this Court considered the act of state doctrine in the context of the Cuban expropriations support the Third Circuit's decision.[13] In each of those cases, this Court reaffirmed that the act of state doctrine bars review of the acts of a foreign state within its own territory. In *Sabbatino*, a case involving a claim by United States nationals to the proceeds of a sugar sale from property expropriated by the Cuban government, this Court held that the act of state doctrine barred inquiry into the validity of the Cuban expropriation. Nor did any of the justices' opinions in *Citibank*, where this Court permitted a counterclaim for damages to be asserted as a setoff right in a case involving expropriation of a bank branch, alter the basic principle of *Sabbatino*. Finally, in *Dunhill*, this Court reaffirmed its decision in *Sabbatino* to the extent that the act of state doctrine bars consideration of the legality of the expropriation in the context of a claim by former cigar companies to the proceeds of cigar sales *subsequent to* the Cuban expropriation.

Nothing in this Court's decisions to date suggests that the act of state doctrine should not apply in this case where plaintiff's allegations directly implicate the sovereign act of the Nigerian government in a significant military procurement decision. In this regard, this case is similar to the expropriation decisions, where this Court has declined to determine the legality of an expropriation, rather than the antitrust cases where it was only necessary to examine the acts of the defendant and not those of the foreign sovereign.

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[13] *Dunhill*, 425 U.S. 682; *Citibank*, 406 U.S. 759, *Sabbatino*, 376 U.S. 398.

(b) *The Lower Court Cases Including those Relied upon by the Third Circuit Do Not Support the Third Circuit Decision*

(i) *Third Circuit Precedent*

The Third Circuit, without much supporting analysis, relied upon two prior Third Circuit cases to find the act of state doctrine inapplicable to this case, even though the facts and circumstances of those two cases were entirely dissimilar to this action. *See Curtiss-Wright*, 694 F.2d 300; *Mannington Mills*, 595 F.2d 1297.

Both *Mannington Mills* and *Curtiss-Wright* involved claims of antitrust violations which only indirectly involved conduct by a foreign government. In *Mannington Mills*, the plaintiff brought an antitrust action claiming that defendant made false representations to several foreign governments in connection with the issuance of certain patents for floor coverings. The district court dismissed the complaint in part on the ground that the validity of each of the patents should be determined by the issuing nation. 595 F.2d at 1290. In reversing, however, the Third Circuit held only that the act of state doctrine did not bar plaintiff's suit because the governments' conduct in granting a patent is not the type of sovereign activity which would concern the executive branch in the conduct of foreign affairs. *Id.* at 1294.

In *Curtiss-Wright*, the plaintiff alleged that defendant had monopolized the worldwide market in the sale of certain surplus jet engine parts as the result of anticompetitive activities in violation of the Sherman Antitrust Act. 694 F.2d at 302. The defendant alleged that the case would require inquiry into the motives of foreign governments in refusing to purchase from plaintiff, but in fact, as the court found, the thrust of plaintiff's allegations involved only the defendant's monopolistic practices which included anticompetitive conduct within the United States. *Id.* at 303-04. As the court observed, the complaint "treats the foreign governments, not as wrongdoers against plaintiff, but as fellow victims . . . ." *Id.* at 303. The Third Circuit determined that plaintiff's challenge was to the anticompetitive effect of the defendant's

activities, and not to the validity of the decisions by foreign governments to boycott it.[14] Although the court suggested that this Court's decision in *Continental Ore* refuted defendants' contention that the act of state doctrine barred inquiry into the motivations behind the military procurement decisions of the foreign governments, it did not find that such an inquiry would be required for plaintiff to prevail in the case. Nor did the court suggest that the act of state doctrine could never bar inquiry into the motivation of a sovereign act.

In this case, the Third Circuit did not examine the different factual and legal contexts in which the *Mannington Mills* and *Curtiss-Wright* cases arose. However, neither *Curtiss-Wright* nor *Mannington Mills* involved the kind of direct factual finding of illegality by a foreign government that adjudication of this case will require. Therefore, permitting inquiry into the motivation of the Nigerian government in this case goes far beyond anything previously suggested by *Mannington Mills* or *Curtiss-Wright*.

Although not relied upon by the Third Circuit, at least one other circuit court decision has permitted some inquiry into a foreign government's motivation, albeit under circumstances not applicable to this case. The Fifth Circuit, in a divided decision in *Mitsui*, reached a conclusion which would permit some inquiry into motivation limited to the issue of plaintiffs' damages. The court declined to apply the act of state doctrine in a case where plaintiffs alleged that defendants conspired to eliminate competition in the lumber business in Indonesia by, among other things, causing the Indonesian Government to cancel an agreement with plaintiffs and to deny it a license, 594 F.2d 55-56. The Fifth Circuit found, as this Court did in *Continental Ore*, that

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[14] In both *Mannington Mills* and *Curtiss-Wright*, the Third Circuit raised, but did not decide, the issue of whether jurisdiction should be declined as a matter of international comity. *Mannington Mills*, 595 F.2d at 1294-98; *Curtiss-Wright*, 694 F.2d at 305. Since the act of state doctrine was "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government," *Citibank*, 406 U.S. at 762, the Third Circuit should have considered comity as a part of the act of state doctrine and not as a separate legal principle which it declined to reach. *See infra*, Point II(2).

neither the validity of the Indonesian regulations nor the legality of the behavior of the Indonesian government was in question. *Id.* at 49. The court found it was unnecessary on the issue of liability to determine whether plaintiffs would have received the license since plaintiffs alleged damages other than their failure to obtain the license. *Id.* at 54. The court observed that the Indonesian government's motivation for denying plaintiffs the license was not essential to plaintiffs' case since plaintiffs did not need to prove that the defendants' acts were the sole cause of injury to plaintiffs. *Id.* However, the court held that inquiry into the motivation behind the Indonesian government's actions limited solely to the measure of plaintiffs' damages "does not trigger the type of special political considerations protected by the act of state doctrine." *Id.* at 55.[8] *See also Northrop Corp. v. McDonnell Douglas, Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983) (Ninth Circuit declined to decide whether the act of state doctrine barred inquiry into foreign procurement decisions to establish the amount of damages in an antitrust action since the fact of damages could be determined without reference to those decisions).

In this case, ETC has not alleged any injury other than the issuance by the Nigerian government of a military contract to Kirkpatrick based upon the payment by Kirkpatrick of a bribe. Therefore, in this case, unless ETC can prove both that the bribe was the but-for cause of the Nigerian government's award of this contract to Kirkpatrick and that ETC would have been awarded the contract if a bribe had not been paid, it cannot allege injury sufficient to state a claim. Therefore, unlike *Mitsui* and *Northrop*, adjudication of ETC's claim necessarily requires the court to inquire into the validity and motivation of the sovereign acts of the Nigerian government. Furthermore, that inquiry would involve "the legality of the behavior of the [Nigerian] government." *Mitsui*, 594 F.2d at 53; *see Continental Ore*, 370 U.S. at 706.

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[8] The dissent, agreeing with the district court that "the damage complained of stems directly from the denial of the government concession to cut timber," would have held the action barred by the act of state doctrine. 594 F.2d at 56.

(ii) *Other lower court cases*

In contrast to the Third Circuit's decision in this case, other circuits have rejected the motivation-validity distinction in cases where the issue of motivation cannot be separated from the validity of the act or where the act of the foreign government was a direct cause of the injury to the plaintiff, both of which are applicable to this case. *See Clayco*, 712 F.2d 404; *Hunt*, 550 F.2d 68; *Occidental Petroleum*, 331 F. Supp. 92.[16] These cases have addressed the issues in keeping with the purposes behind the act of state doctrine as expressed by this Court and contrary to the mechanistic application of the motivation-validity distinction used by the Third Circuit.

In a decision directly contrary to the Third Circuit decision in this case although based upon, facts very similar to this case, the Ninth Circuit in *Clayco* found the motivation-validity distinction inapplicable. In *Clayco*, plaintiff alleged that defendant, Occidental Petroleum Corporation, made secret payments to the Petroleum Minister and son of the ruler of Umm Al Qaywayn, to secure a valuable off-shore oil concession which otherwise would have gone to plaintiff Clayco.[17] Occidental had previously entered into a consent decree with the SEC. The court rejected the contention that the act of state doctrine was inapplicable because adjudication required only an inquiry into the motivation behind the foreign sovereign's act and not its legal validity. The Ninth Circuit, declining to adopt the argument that the act

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[16] Although decided by analyzing the political question doctrine, a Fifth Circuit case which would have required a factual determination identical to that in *Occidental Petroleum* also highlights that motivation and validity are inseparable when a court examines acts taken by a foreign sovereign. *See Occidental of UMM Al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

[17] In *Clayco*, plaintiff apparently claimed that the Government had already agreed to give it the contract and then revoked its decision when defendant paid the bribe. 712 F.2d at 405. In this regard, plaintiff's proof in *Clayco* might have been easier than the morasse which would be caused by this case where ETC would need to prove that the Nigerian government would have awarded the contract to ETC over all other bidders.

of state doctrine is inapplicable to all cases where only motivation is at issue, pointed out that in the case before it, "plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery [and] thus embarrassment would result from adjudication." 712 F.2d at 407. In reaching its conclusion that the act of state doctrine barred plaintiffs' claim, the Ninth Circuit focused upon the degree to which judicial scrutiny would "impugn or question the nobility of a foreign nation's motivation. . ." *Id. quoting Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976).

The *Clayco* court relied upon *Occidental Petroleum*,[18] a case in which plaintiffs alleged that the Ruler of Umm al Qaywayn had issued a fraudulent territorial decree to enable defendants rather than plaintiffs to exploit oil and gas in a certain area. In *Occidental Petroleum*, the court found the act of state doctrine barred the antitrust claims which implicated the foreign sovereigns as "co-conspirators." 331 F. Supp. at 110. The court concluded that plaintiffs' allegations directly related to the conduct of the foreign state, and thus the court's inquiry would involve "the authenticity and motivation of the acts of foreign sovereigns [which] would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Id., citing Sabbatino*, 376 U.S. at 423-24.

Similarly, the Second Circuit, in *Hunt*, wrestled with a case where adjudication would have required inquiry into the validity and motivation behind sovereign acts of Libya. In *Hunt*, plaintiff, an independent oil producer with a Libyan oil concession, alleged that defendants, major oil producers in Libya and the Persian Gulf, had unlawfully combined and conspired to exclude plaintiff from Libya in furtherance of a plan to preserve their competitive advantage. As a result of defendants' actions, plaintiffs alleged, Libya first terminated plaintiffs' rights to produce and export oil and then nationalized plaintiffs' assets in Libya. The Second Circuit found the act of state doctrine applicable

[18] The case was subsequently affirmed by the Ninth Circuit on the basis of the district court opinion.

because the judicial inquiry would involve both the validity of the acts taken by Libya and "the underlying reasons" for the government's actions. 550 F.2d at 72. The court reasoned, as is true in this case, that the validity of Libya's act cannot logically be separated from the motivation behind those acts, and therefore the nexus between defendants' conduct and the government's actions made act of state concerns "inescapable." *Id.* at 76. As the Second Circuit observed, the claim "is admittedly not viable unless the judicial branch examines the motivation of the [government's] action and that inevitably involves its validity." *Id.* at 77.

Thus, prior cases determining application of the act of state doctrine have turned upon the extent to which the foreign government's sovereign act is crucial to resolving the allegations. In cases such as *Clayco* and this case in which it is alleged that bribery of a foreign sovereign led to the act of state, a defendant's conduct cannot be examined without directly implicating the foreign sovereign and its agents, and without examining the validity of the sovereign act.

3. *Public Policy Interests Are Not Thwarted by Application of the Doctrine to this Case*

In its decision barring application of the act of state doctrine to this case, the Third Circuit, again without analysis, suggests that the act of state doctrine should not interfere with implementation of the policies served by United States regulatory statutes. Third Circuit Opinion (A. 331) *citing Continental Ore*, 370 U.S. 690. However, application of the act of state doctrine frequently impacts upon United States regulatory statutes. Therefore, the fact that application of the doctrine has an effect upon enforcement cannot be dispositive of whether it should be applied in a given instance. A determination of the doctrine's applicability should involve a balancing between United States regulatory interests and the foreign policy interests protected by the act of state doctrine. *See, e.g., Mitsui*, 594 F.2d at 55.

United States regulatory interests in cases of foreign bribery are protected by the Foreign Corrupt Practices Act, 15 U.S.C

§ 78dd-2 ("FCPA"), which makes it a criminal offense to offer a bribe to a foreign official to obtain a contract. The Third Circuit did not analyze whether the regulatory interests served by the FCPA should prevent application of the act of state doctrine to foreign bribery cases because those regulatory interests outweigh the presumed foreign relations problems created by a judicial finding that a sovereign act of state was based upon the acceptance by foreign officials of an illegal bribe.

Under the FCPA, the Justice Department and the SEC are alone authorized to enforce the Act. Since the FCPA does not provide for private remedies, presumably Congress did not consider private rights of action necessary to effect its regulatory scheme.[9] Indeed, there are good reasons to limit enforcement of the FCPA to the government. "[A]ny prosecution under the Act entails risks to our relations with the foreign governments involved." *Clayco*, 712 F.2d at 408. Limiting enforcement to government actions allows a judgment to be made in each case that the benefits of a prosecution outweighs any foreign policy concerns involved. This judgment, absent when a private litigant brings such an action, necessitates use of the act of state doctrine in such suits "to protect the proper conduct of national foreign policy." *Clayco*, 712 F.2d at 409. Further, permitting private actions will result in lawsuits by all disappointed bidders on foreign government contracts which will certainly have adverse consequences on the conduct of foreign policy.

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[9] When Congress wants to provide a private damage remedy, it knows how to do so and does it expressly. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). Further, there is no reason to imply a private right of action where a statute, such as the FCPA, is designed to benefit the public and not a class of persons such as the private business competitors here. *See Cannon v. University of Chicago*, 441 U.S. 677, 690-92 (1979). Although no case has addressed the bribery section of the FCPA, a couple of courts have declined to imply a private right of action to other sections of the FCPA. *See McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (15 U.S.C. 78ff(c)(3)); *Lewis v. Sporck*, 612 F. Supp. 1316, 1327 (N.D.Cal. 1985) (15 U.S.C. 78m(b)(2)). In addition, some commentators have doubted the existence of a private right of action under the FCPA. *See generally* Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 Colum. L. Rev. 1085 (1979); Note, *The Foreign Corrupt Practices Act: A Private Right of Action?* 12 Vand. J. Transnat'l L. 735 (1979).

The fact that the Government brought an action against Kirkpatrick does not change the analysis. The proof required in a private litigation goes well beyond that required by the Government under the FCPA. The Government need not prove that the foreign government actually received a bribe or that payment of a bribe produced the desired results. *See* 123 Cong. Rec. S13,816, 13,820-21 (daily ed. May 5, 1977) (statement of Sen. Byrd). Indeed the government charge and offer of proof in the criminal case carefully avoided any statement as to whether any Nigerian government official received the bribe, let alone whether such a bribe caused the Nigerian government to award the military contract to Kirkpatrick or whether the Nigerian government as a practice requires such payments in connection with its contract awards. Further, the Government expressly represented to the court at sentencing that disclosure of any additional details of the investigation would have adverse political and diplomatic consequences. (A. 45). However, this suit presents a significantly greater threat of embarrassment to foreign relations than did the criminal action.

In this civil case, ETC's claim depends upon proving that the bribe was actually received by one or more officials, that the bribe caused the Nigerian government to issue the contract and that ETC would have obtained the contract without such a payment. This examination of governmental and political processes in Nigeria was unnecessary in the criminal case. A private action also has procedural differences which make it more problematic: the protection afforded by grand jury secrecy will be absent; discovery provided by the civil rules will be considerably broader and its conduct dictated by private parties; and the Executive will be unable to terminate or restrain the litigation if external events cause it to revise initial predictions on the impact upon foreign relations.[20]

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[20] The State Department in its Sofaer Letter, recognized those problems urging the district court to ensure that "caution and due regard for foreign sovereign sensibilities" (A. 269) be exercised at each relevant stage in the proceeding and advising that the court should "endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." (A. 334). The Third Circuit also noted the "dissatisfaction of foreign governments with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad," as well as the number of foreign states that have enacted "blocking laws" to bar discovery by United States courts. (A. 334)

Therefore, even when the United States Government has determined that the beneficial effects of prosecution outweighs any foreign policy concerns, the substantially more direct proof of illegal action by the foreign sovereign required in a civil case and the lack of supervision and control by the Executive might lead the Government or the courts to a different conclusion in weighing those same factors.

II

THE ACT OF STATE DOCTRINE BARS ADJUDICATION OF ETC'S CLAIMS

This Court has adopted a flexible rule concerning application of the act of state doctrine. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The modern justification for the act of state doctrine, as discussed in *Sabbatino*, is rooted in considerations of preserving the constitutional mandate of separation of powers between the federal judiciary and the political branches. *Id.* at 423-24. Essentially a counterpart to the political question doctrine, the doctrine is founded in part upon the Court's recognition that judicial entanglement in the acts of a foreign government "may hinder rather than further this country's pursuit of goals . . . in the international sphere," *id.* at 423, and that judicial review "could embarrass the conduct of foreign relations . . . ." *First National City Bank v. Banco Nacional de Cuba* 406 U.S. 759, 765 (1972). Since the viability of the doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs," *Sabbatino*, 376 U.S. at 427, the balance of relevant considerations shifts on virtually a case-by-case basis.

The act of state doctrine originally developed so that American courts would respect sovereign autonomy and international comity. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). This concept is set forth in the Supreme Court decision in *Underhill*:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill, 168 U.S. at 252. The Court has reaffirmed more recently that the concepts of sovereign immunity and comity may justify application of the act of state doctrine. *See Citibank*, 406 U.S. at 762, 765.[a]

To effectuate the broad principles of sovereignty and separation of powers, the act of state doctrine should be applied on a case-by-case basis using a balancing process to account for the respective judicial and political concerns. See *Sabbatino*, 376 U.S. at 428; *Citibank*, 406 U.S. at 774-5; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 718 (1976) (Marshall, J., dissenting) (citing the "careful case-by-case approach adopted in *Sabbatino*"). Since the factors to be considered will vary in each case, as will the weight to be given each factor, the doctrine must be flexible enough to tailor application to the varied legal and factual circumstances of each case.

In this case, all the relevant factors mitigate in favor of application of the act of state doctrine to this case: (1) both the validity and motivation behind the Nigerian government's award of the contract to Kirkpatrick are directly in issue (as discussed in Point I); (2) the award of the contract was an act of state and does not come within the commercial exception to the doctrine;

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[a] Great Britain has adopted our act of state doctrine relying upon the reasoning of the Fifth Circuit case, *Occidental of UMM AL Qaywayn, Inc. v. A. Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979)(hereinafter *Occidental*), in defining the parameters of the doctrine. *Buttes Gas & Oil Co. v. Hammer*, [1981] 3 W.L.R. 787 (hereinafter *Buttes*). The British *Buttes* case arose out of the same facts as *Occidental Petroleum*. In response to a libel action by Occidental claiming that Buttes had used improper methods to obtain a decree regarding oil rights (at issue in the American case), Buttes asserted the defense of justification and counterclaimed, alleging a conspiracy by Occidental to deprive Buttes of the oil rights. Lord Wilberforce applied the act of state doctrine, reasoning that to resolve these issues the court would be required to examine both the motives of a foreign sovereign and the validity of its acts. *See Buttes*, [1981] 3 W.L.R. at 809.

(3) this case will require the court to become embroiled in determining matters for which no judicial or manageable standards exist and which bear upon the practices of the Nigerian government in the conduct of its sovereign affairs of state; and (4) the Executive appears to have vacillated about the foreign policy implications in this case, as well as generally regarding the act of state doctrine, and in any event cannot determine justiciability. The latter three points are discussed below.

1. *The Award of a Military Procurement Contract by the Nigerian Government Is an Official Sovereign Act*

As found by both lower courts, the award of this contract, involving a military procurement decision by the Nigerian government, was an act of state and does not come within the exception to the act of state doctrine for purely commercial acts.[22] "The award of a military contract, particularly one for a major project, is usually influenced by national security considerations. . . ." Third Circuit Opinion. (A. 327) Sovereign acts which involve policy determinations to effect political and public interests constitute acts of state. *Remington Rand Corporation-Delaware v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987). Although this Court has never addressed the issue, lower court decisions have found a sufficient expression of sovereign public interest in military procurement decisions to constitute acts of state.[23] *See, e.g., Williams v. Curtiss-Wright Corp.*, 694 F.2d

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[22] In the Sofaer Letter, the State Department suggests that the military contract award may not involve a sufficiently official act of the foreign sovereign to constitute an act of state. (A. 269) We disagree, as apparently does the Solicitor General. "[T]here is considerable force to the conclusion by both courts below that the decision to award a military procurement contract . . . is a sufficiently 'official' expression of a state's 'public' interests to warrant application of the act of state doctrine." Solicitor General Amicus Brief to Petition For Writ of Certiorari, p. 18, n.13.

[23] Although some commentators have suggested the act of state doctrine should be limited by narrowing the scope of acts constituting acts of state, the military procurement decision here should come within any definition. *See generally*

(footnote continued)

300, 302 (3d Cir. 1982); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983). This contract is not the kind of routine government act which may be excepted from application of the doctrine as not giving rise to governmental concerns in the conduct of foreign policy. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d. 1287, 1294 (3d Cir. 1979) ("[T]he grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of foreign affairs").[24]

Nor does the award of this contract come within the exception to the doctrine, adopted by some lower courts and by a plurality of this Court in *Dunhill*, applicable to cases involving the purely commercial activities of a foreign government. *See Dunhill*, 425 U.S. at 706 (opinion of Justice White in which Justices Rehnquist, Powell and Burger joined). Both lower courts properly rejected ETC's contention that the award of this contract was an ordinary commercial transaction. Third Circuit Opinion. (A. 328); District Court Opinion. (A. 297). The military procurement decision involved here is one of the "historically recognized governmental functions of a State [and not] the kind which theretofore had been pursued by private enterprise."[25] *Dunhill*, 425 U.S. at 696.

Note, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 Va. J. Int'l. L. 104 (1982). Further, to define acts of state narrowly might unnecessarily hamper application of the doctrine, since a government action insignificant to one country might be important to another.

[24] *Cf. Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 128, (S.D.N.Y. 1974) (Wemfeld, J.); Lowenfeld, *Litigating a Sovereign Immunity Claim — The Haiti Case*, 49 N.Y.U. L. Rev. 377, 412-22 (1974).

[25] The many officials involved in the decision to award this contract, which appears to have included the president, air force officials, party officials, ministry officials and other defense department personnel, is sufficient to determine that the nature of the act was an official expression of Nigeria's public interests, warranting application of the act of state doctrine. *See* Memoranda. (A. 217 and 221)

2. *The Political Question Doctrine and Principles of Comity Require Application of the Act of State Doctrine to this Case*

The degree to which the judiciary will become embroiled in matters which it is not equipped to handle or which are best left to the Executive is a factor to be considered in determining application of the act of state doctrine. In this regard, the doctrine may be said to apply principles of comity[26] as well as the political question doctrine. *See Citibank*, 406 U.S. at 787-88 (Brennan, J., dissenting); *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 547-53 (S.D.N.Y. 1984).[27] "The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of the Court." *Citibank*, 406 U.S. at 790. In this case, there exists both "a lack of judicially discoverable and manageable standards for resolving the matter" and the necessity to make a "policy determination of a kind clearly for nonjudicial discretion . . . ." *Baker v. Carr*, 369 U.S. 186, 217.[28]

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[26] *See, e.g., Citibank*, 406 U.S. at 768 (Rehnquist, J.) (considerations of comity are a factor in determining an act of state defense); *Oetjen*, 246 U.S. 304-305 (same).

[27] The act of state and political question doctrines have been used interchangeably. *Compare Occidental*, 577 F.2d 1196, *with Occidental Petroleum*, 331 F. Supp. 92. Both cases would have required a judicial determination of the rights to an oil concession in the Persian Gulf. While both courts declined to adjudicate the issue, the Ninth Circuit declined on the basis of the act of state doctrine and the Fifth Circuit on the basis of the political question doctrine. *See also Buttes* [1981] 3 W.L.R. 787 (adopting Fifth Circuit's approach of examining the political question rationale to act of state doctrine); Note, *Reflections on the Act of State Doctrine: A Fifth Wheel in Conflicts of Law*, 10 Hous. L. Rev. 1 (1972) ("the assimilation of the act of state doctrine under the 'political question' concept is a first step toward a more rational and flexible approach to the justiciability of acts of state).

[28] The House of Lords in *Buttes* found it could not adjudicate that case by reasoning that the British court would be without manageable standards, placing it in a "judicial no-man's land." [1981] 3 W.L.R. at 810.

Resolution of ETC's claims would require the district court to interject itself into the process of the military procurement decisions of the Nigerian government as well as the policies and practices behind those decisions. First, the district court would need to determine what considerations and factors went into the Nigerian government's decision to award the contract to Kirkpatrick. Then, a determination would have to be made concerning whether the payment, or promise of payment, of a bribe had the effect of causing the Nigerian government to award the contract to Kirkpatrick. These inquiries alone, involving the motive behind and validity of a sovereign act of the Nigerian government as well as illegal conduct by officials of the Nigerian government, should be precluded by[29] the act of state doctrine.

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[29] Neither the provisions of Nigerian law nor analogous provisions in United States law establish sufficiently clear standards for judicial inquiry into sensitive areas of a foreign sovereign's internal affairs. *See Sabbatino*, 376 U.S. at 428 (no treaty or other unambiguous agreements concerning controlling legal principles exists). Even within our own legal system, there has been considerable disagreement about the kinds of foreign payments which should be deemed "corrupt" and thus actionable; under the FCPA for example, an entire class of payments to foreign officials – "grease payments" – are specifically condoned under federal law. In limiting the scope of the FCPA, Congress identified both the lack of universally accepted standards and the need to provide parties dealing with foreign government officials clear notice of what the statute prohibits.

> The language of the bill is deliberately cast in terms which differentiate between corrupt payments and facilitating payments, sometimes called "grease payments." In using the word "corruptly," the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.
>
> While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, *the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments....*

(footnote continued)

However, even if ETC were permitted to establish an illicit motive by the Nigerian government for its contract award to Kirkpatrick, the inquiry would not end there. ETC must also prove that Kirkpatrick's payment of a bribe was the cause of ETC's injury. To do so, ETC must prove that it would have been awarded the contract if Kirkpatrick had not paid a bribe. Such an inquiry necessitates complex determinations which go beyond the judiciary's competence and beyond any findings required in other cases where the courts have declined to apply the act of state doctrine.

Since bidders other than Kirkpatrick and ETC were involved,[30] ETC must demonstrate that it would have been awarded the contract over all other bidders. To reach such a determination, the court will be required to examine the Nigerian procurement process and to determine not only what considerations went into the Nigerian government's decision to award the contract to Kirkpatrick but also, if that award is found to have been improperly granted, what considerations *should* have been used in awarding the contract. This inquiry is required for the court to determine whether ETC's bid should have or would have been accepted by the Nigerian government instead of any of the other bids. Our courts are not competent to decide this issue and it is unlikely that the Nigerian government would cooperate in any such effort.[31] The considerations involved in the Nigerian

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H. Rep. No. 95-640, 95th Cong., 1st Sess. at 5 (Sept. 28, 1977) (emphasis supplied). *Accord* 123 Cong. Rec. H11932 (daily ed. Nov. 1, 1977).

No such explicit statutory guidance is presented in the statute Nigeria outlawed bribery. In analogous situations involving state-federal comity, federal courts abstain from interpretations of state law that touch on sensitive areas of state sovereignty. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). International comity demands comparable restraint.

[30] There is evidence that there were at least two other European bidders, however the record does not disclose the amount or nature of those bids. (A. 213)

[31] *See Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (Nigeria entered into a contract under which it agreed to submit any

(footnote continued)

government's determination could – and likely did – include sensitive and confidential information involving national security concerns. Certainly our Government would not want the courts of another country to make such an inquiry regarding our national security decisions.[22]

Finally, the court would have to resolve the issue of whether ETC would have been required to pay a bribe in order to obtain the contract. In this connection, it is unknown what proof ETC would seek to present to show that it would have obtained the award without a payment, but Kirkpatrick, in furtherance of its defense that ETC would have been required to make a payment as would any successful bidder to this contract, would seek to prove that it is the practice of the Nigerian government to require such payments. That inquiry would involve a potential finding that the practices of the Nigerian government are inconsistent with its stated policy as reflected in its law which makes it illegal for a government official to accept a bribe. This inquiry is also plainly inappropriate for our courts.

Thus, this case requires resolution of issues which are either not possible or not appropriate for judicial resolution. As Lord Wilberforce so aptly stated in *Buttes*:

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disputes to arbitration by the International Chamber of Commerce, Paris, France, but subsequently refused to appear, plead, answer or otherwise participate); *United Export Trading Co. v. Federal Republic of Nigeria*, 4 Fed. R. Serv. 3d 311 (1986) (court imposed a large fine against the Republic of Nigeria which failed to respond to requests for production of documents and notices for depositions). Further, the ability to obtain documents and information would be severely hampered by Nigerian law. *See* Official Secrets Act of 1962, No. 29 (Sept. 13, 1962), which makes it a crime to disclose any information that the Nigerian government deems "classified."

[22] Indeed in civil actions concerning our government, we insulate the deliberative processes of the executive and the legislature from direct scrutiny of subjective motive through invocation of various immunity doctrines. *E.g. United States v. Nixon*, 418 U.S. 683, 705, 708 (1974) (identifying executive privilege as necessary for officials "to be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"); *United States v. Johnson*, 383 U.S. 169 (1966) (immunity conferred by Speech or Debate Clause precludes inquiry into motivation of Congressman's speech or legislative acts).

> [The issues] have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass.

[1981] 3 W.L.R. at 810. Whether by operation of the act of state doctrine, the political question doctrine or principles of comity, inquiry into these issues are plainly not appropriate for judicial determination by our courts.

3. *The Executive Cannot Determine Justiciability*

The majority of this court has rejected the *Bernstein* exception created by the Second Circuit in a case involving a decree of the Hitler government of Nazi Germany to except from application of the doctrine cases where the Executive represents that application of the doctrine would not advance the interests of American foreign policy. *See Bernstein v. N.V. Nederlandsche -- Amerikaansche, Stoomvaart -- Maatschappij*, 210 F.2d 375 (2d Cir. 1954). The *Bernstein* exception would not be applicable here even under the rationale of Justice Rehnquist's opinion in *Citibank* (in which only Justices White and Burger joined) since in that case the State Department had "expressly represent[ed] to the Court that application of the act of state doctrine would not advance the interests of American foreign policy . . . ." *Citibank*, 406 U.S. at 768.

In this case, the State Department has expressed concerns about the effects of the litigation in Nigeria: "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." (A. 269) Then, relying upon the United States amicus briefs in *Mitsui* and *Hunt*, the State Department took the legal position that the act of state doctrine does not bar inquiry into the motivation of a foreign sovereign's acts but only their validity. "If the adjudication of this suit were to involve a judicial inquiry into the motivation of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute . . . ." (A. 269) However, the State

Department concluded that the foreign policy concerns in this case "counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings." (A. 269) The district court, observing that this statement left the court in the position of weighing foreign policy concerns in ruling upon discovery demands and evidentiary issues at trial, concluded that "[t]he suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate."[23] District Court Opinion. (A. 305)

Contrary to the district court, the Third Circuit construed the Sofaer Letter to mean that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of [respondent's] lawsuit." (A. 333-334) The Third Circuit dismissed the expressed concerns of the State Department, finding that those statements "should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the Executive has become familiar." Third Circuit Opinion. (A. 334)

The State Department position as set forth in the Sofaer Letter appears to avoid the decision which the *Bernstein* exception would permit it to make. That decision is whether a case will affect United States foreign relations without regard to whether the case should proceed under otherwise applicable judicial standards for application of the act of state doctrine. Here, the State Department advised the court that under legal standards advocated by the Executive for application of the doctrine, the case should go forward but that foreign relations might be affected. Thus, the State Department has not provided the kind of statement which would warrant application of a *Bernstein* exception. Indeed, the State Department indicated not only through the Sofaer Letter but also during the criminal proceedings that foreign policy concerns do exist. During the sentencing of Carpenter, the Government told the Court that the State

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[23] To the point, the district court stated that the suggestion of the State Department was not constitutional because it would require the judiciary to violate the principle of separation of powers. (A. 306-307)

Department was concerned about the repercussions in Nigeria of factual disclosures in this case.[*] *See supra*, p. 2; Transcript of W.S. Kirkpatrick Sentencing. (A. 45)

Even if the State Department were to clarify its position in accord with the Third Circuit's interpretation, that position should not be dispositive, as six of the nine justices of this Court agreed in *Citibank*. To follow the dictates of the State Department would require the Court "to abdicate its judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations." *Citibank*, 406 U.S. at 778. (Brennan, J., dissenting); *see* Restatement (3d) Foreign Relations Law of the United States § 443, comment h (1987).

The position of the Executive and that of the State Department has not remained constant from case to case, and indeed appears to have changed even within this case. The political considerations of the executive changes, "as surely as administrations change." *Citibank*, 406 U.S. at 792. (Brennan, J., dissenting) Thus, the separation of powers as well as even-handed application of law cannot depend upon political decisions which "vary from day to day with the shifting winds at the State Department." *Id.* at 792. A review of the various positions taken by the Solicitor General and the State Department on act of state issues reflects vacillations in positions on the general applicability of the doctrine as well as on specific foreign policy concerns in various cases. (See, *e.g.*, *Dunhill*, 425 U.S. at 725, n. 10 (Marshall, J., dissenting) (*noting* that the State Department urged application of the doctrine in *Sabbatino* and then asked the court to overrule *Sabbatino* in *Dunhill*). Indeed, the vacillation of the State Department even within this case demonstrates the wisdom of judicial decision in these cases.

While a statement by the Executive that a case would adversely impact upon our foreign policy should undoubtedly be given great weight, *see* Restatement, comment c, the fact that the Executive

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[*] The Third Circuit dismissed the Government's statements as not addressed to act of state questions and made almost a year before the Sofaer Letter.

may not object to a litigation does not make the issues appropriate for determination. "The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim." *Citibank*, 406 U.S. at 788-89 (Brennan, J.). Nor can it be said that the Executive is indifferent to the outcome of this case. *See Citibank*, 406 U.S. at 783. The State Department has expressed concern with its consequences in Nigeria where certain officials involved in this matter are still in power. In fact, the State Department has expressed concern about the consequences of even the discovery process. Further, this case would require an inquiry into possible determination by the court that the Nigerian government acted with corrupt motives. Since senior officials of the government are still in power, the Executive cannot be indifferent to the outcome since such a finding would clearly embarrass and impede the continuation of satisfactory relations with a government or official implicated by our judiciary.

Thus, even if the Executive were to state that adjudication would not affect our foreign relations, the judiciary cannot be bound by the opinion of the Executive in determining application of the doctrine, and the political question concerns addressed by the act of state doctrine, and raised by this case, must be left to the judiciary.[28]

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[28] Lord Wilberforce reached the same conclusion in *Buttes*. "I appreciate . . . that no indication has been given that Her Majesty's Government would be embarrassed by the court entering upon these issues. But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending as they must upon an appreciation of the nature and limits of the judicial function." [1981] 3 W.L.R. at 809.

CONCLUSION

Our courts have never, and should not now, challenge the validity or purpose of a foreign government's sovereign act. Resolution of the issues raised by this case is precluded by principles of comity, and also by the political issues raised which are either not capable of or not appropriate for resolution by our courts. Further, if this case is not barred by the act of state doctrine, the spectre of numerous disappointed bidders for foreign government contracts seeking judicial relief plainly raises foreign policy concerns. Those concerns are not resolved by the vacillating positions of the State Department in this case, or by whatever position the Executive may finally take before this Court. The manifold purposes behind the judicially-created act of state doctrine warrant its application to this case. Therefore, we urge this Court to reverse the judgment of the Court of Appeals for the Third Circuit and find ETC's claims barred by the act of state doctrine.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. And W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

vs.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the act-of-state doctrine precludes adjudication of an action between private American litigants where:

(a) The action concerns Defendants' commercial bribery of Nigerians in order to deprive Plaintiff of a commercial contract with the Nigerian Air Force;

(b) The conduct in question constitutes a violation of the Foreign Corrupt Practices Act;

(c) The conduct is not the sovereign act of a foreign government and is, in any event, within the commercial activity exception to the act-of-state doctrine; and

(d) The United States Department of State has advised the lower courts that it does not believe the act-of-state doctrine precludes adjudication of the dispute.

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In the
Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And [illegible]KPATRICK & CO., INTERNATIONAL,
Petitioners,

vs.

[illegible]MENTAL TECTONICS CORPORATION,
INTERNATIONAL,
Respondent.

[illegible]OF CERTIORARI TO THE UNITED STATES
[illegible]OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Proceedings Below

This is an action by Environmental Tectonics Corporation, International ("ETC" hereafter), against W. S. Kirkpatrick & Co., Inc. ("Kirkpatrick" hereafter), its corporate parents and its corporate DISC subsidiary, as well as two of Kirkpatrick's corporate officers, one of its two corporate subcontractors and officers of both, for violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO" hereafter), 18 U.S.C. §§1961, *et seq.*, (Count I) (J.A. 71), the New Jersey RICO analog to the federal statute, N.J. Stat. Ann.

§§2C:41, *et seq.* (1982) (Count II) (J.A. 92), and the Robinson-Patman Act (Counts III and IV) (J.A. 73-75), 15 U.S.C. §§13(c), *et seq.* ETC seeks compensatory damages, statutorily trebled damages, attorney's fees, and punitive damages (Count VII) (J.A. 79). In addition, ETC has brought a libel/trade slander claim (Count V) (J.A. 76) and an interference with prospective contractual relationship claim (Count VI) (J.A. 78) against the corporate subcontractor and its president.

The action arises out of a contract award by the Minister of Defense of the Federal Republic of Nigeria to the Kirkpatrick DISC subsidiary for the purchase of "Devices and Spares for an Aeromedical Facility" at the Kaduna Air Force Base in Kaduna, Nigeria (J.A. 81) (the "Kaduna contract"). The contract required the Kirkpatrick DISC subsidiary to supply the hardware necessary to provide a turnkey job as to the facility. The total price payable to Defendants under the contract was $10,835,048.75 (J.A. 82).

ETC was the competing bidder for the Kaduna contract but lost the competition because the Defendants paid bribes, totalling $1,764,019.08, to various Nigerian government agents involved in the award of the contract (J.A. 58-68).

Plaintiff's Complaint—based upon guilty pleas entered before the United States District Court for the District of New Jersey by Defendant Kirkpatrick and its former executive, Defendant Carpenter[1] —contends that Defendants obtained the contract award by violating the Foreign Corrupt Practices Act, 15 U.S.C. §§78dd-1 *et seq.* Those violations, in turn, give rise to Plaintiff's entitlement to damages measured by lost profits under the RICO statutes (both federal and New Jersey) and the Robinson-Patman Act. The profit lost by ETC, before statutory trebling, was $3,000,000 (J.A. 71).

In addition, in Counts V and VI, ETC has sued one corporate subcontractor (Emro Engineering) and its president based on libelous statements made in a letter to the Nigerian Air Force in the course of the bidding process (J.A. 118-19).

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1. Defendant Carpenter, acting as agent for the other Defendants, negotiated the bribes with and through Defendant Akindele (J.A. 18). He also signed the contract on behalf of the Kirkpatrick Defendants (J.A. 103).

Finally, ETC seeks punitive damages (in Count VII) against all Defendants (J.A. 79).

In response to the original Complaint filed on February 4, 1986, certain Defendants[2] filed Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure contending, *inter alia*, that the Complaint failed properly to allege a "pattern of racketeering activity" as required by the RICO statutes (J.A. 6). Plaintiff thereupon filed its Amended Complaint deleting one Defendant, adding six Defendants (the subcontractor Defendant, executives of both subcontractors, and another former president of Kirkpatrick) and adding the two common law Counts (J.A. 54). Plaintiff also filed its Answer to the remainder of the Defendants' 12(b)(6) Motion to Dismiss (J.A. 9).

In reply, Defendants urged, for the first time, that the act-of-state doctrine constituted a basis for dismissal pursuant to Rule 12(b)(6). In response to the assertion of the act-of-state defense, the District Court, Lechner, J., requested submissions from the parties in answer to a series of questions and requested an expression of opinion from the United States Department of State as to the applicability *vel non* of the act-of-state doctrine (J.A. 133). The parties responded with lengthy submissions directed to the specific questions posed by the court below (J.A. 165, 240).

The State Department likewise responded to Judge Lechner's request in a December 10, 1986, letter authored by former federal Judge Abraham Sofaer, Legal Advisor to the Department of State (J.A. 267). The submissions of the parties and of the State Department were considered by the District Court, along with a Rule 56(f) affidavit by ETC's counsel, in relation to the act-of-state issue, thereby converting the Motions to Dismiss into Motions for Summary Judgment pursuant to Rule 56 (J.A. 279).[3]

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2. Defendant Akindele, the intermediary for the other Defendants, has never been served (J.A. 3). Defendant International Development Corporation, S.A., the Luxembourg parent corporation of the Kirkpatrick Defendants, has likewise not been served (J.A. 3).

3. Although Defendants' initial Motions to Dismiss were directed

On May 1, 1987, the District Court filed an opinion and final order: granting summary judgment as to all Counts on behalf of all Defendants and against Plaintiff on the basis of the act-of-state doctrine; granting, in the alternative, Defendants' Motion to Dismiss as to the RICO Counts for failure sufficiently to plead a "pattern" of racketeering activity; and affirming, in the further alternative, the decision of the Magistrate who had allowed Defendant Carpenter to refuse to answer deposition questions on the basis of Carpenter's alleged Fifth Amendment privilege (J.A. 277, *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 659 F.Supp. 1381 (D.N.J. 1987)).

A timely notice of appeal was filed by ETC (J.A. 316). On May 2, 1988, the court below entered its order reversing the judgment of the District Court (J.A. 317, *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988)). The Court of Appeals concluded that Nigeria's award of this procurement contract is an act of state, 847 F.2d at 1058, and that the "commercial activity" exception to the act-of-state doctrine does not apply. 847 F.2d at 1059. The court below rejected *Clayco Petroleum*[4] as representing an "... expansive application of the act-of-state doctrine [which] seems at variance with the principle which has guided this court, that the doctrine is 'not lightly to be imposed.'" 847 F.2d at 1060, quoting from *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979).

Instead, the court below reversed the act-of-state inspired summary judgment of the District Court upon the following analysis:[5]

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against Plaintiff's original Complaint, the courts below treated the Motions as if filed against the Amended Complaint (J.A. 275). Likewise, Defendants who had not theretofore joined in the Motions joined in them at the time of oral argument in the District Court (J.A. 275). Respondent takes no issue with either of those procedural matters.

4. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

5. The court below also reversed the District Court's ruling as to the sufficiency of the pleadings to satisfy the "pattern" requirement of RICO

The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant [Respondent ETC here] does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

* * *

In sum, *the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of ETC's lawsuit.* We appreciate, of course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts. But *the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.* As against that assessment, *defendants have not developed a factual record "showing that adjudication may hinder international relations. . . ."* [Citation omitted.]

This litigation falls squarely within the teaching of *Curtiss-Wright.* In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, *adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign*

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and as to the entitlement of individual Defendant Carpenter to refuse discovery on the basis of a Fifth Amendment claim based upon an alleged fear of criminal prosecution in Nigeria. 847 F.2d at 1062-66. In addition, contrary to Petitioners' renewed assertion in this Court (Brief for Petitioners at 3, n. 2), the court below found— correctly—that:

> As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c).

847 F.2d at 1066-67 (footnote omitted).

> *government's acts.* And, finally, the *defendants* in each case *failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine.*

847 F.2d at 1061-62 (Emphasis supplied) (Footnotes omitted).

The Kirkpatrick defendants filed a timely Petition for Writ of Certiorari raising two issues in this Court: (1) the applicability of the act-of-state doctrine and (2) the sufficiency of the RICO pattern allegations. On June 26, 1989, this Court, after deciding *H. J. Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893 (1989), and after requesting and receiving the views of The United States as *amicus*, granted the Petition, limiting the Writ of Certiorari to the act-of-state question.

STATEMENT OF THE FACTS

Defendant Kirkpatrick is a New Jersey corporation having its principal place of business in Fairfield, New Jersey (J.A. 56). Defendant DIC (Holding) Inc. ("DIC" hereafter) is a Delaware corporation which owns all of the stock of Kirkpatrick. DIC, in turn, is wholly owned by Defendant International Development Corporation, S.A. ("IDC" hereafter), a Luxembourg corporation (J.A. 56, 59). Defendant W. S. Kirkpatrick & Co., International ("International" hereafter), is the DISC corporation organized by Kirkpatrick, DIC and IDC to be the contracting party with the Nigerian government on the Kaduna contract (J.A. 60-62).

Defendant Carpenter first became an employee of Kirkpatrick in 1954 (J.A. 58). By January 1978, he had become Chairman of Kirkpatrick's Board of Directors and its Chief Executive Officer. On January 3, 1978, he sold all of his shareholder and equity interest in Kirkpatrick to DIC and entered into a consulting and employment agreement with Kirkpatrick and DIC whereby he continued as Chairman of the Board and Chief Executive Officer of Kirkpatrick through December 31, 1982 (J.A. 59).

During all pertinent times, Defendant Kirkpatrick sold

and brokered equipment, parts and facilities relating to aircraft and aircraft facilities, both domestically and to airlines, airports and national air forces doing business outside the continental United States (J.A. 58). In 1980, while acting as Chairman and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity to sell aeromedical equipment, including ejection seat trainers, disorientation simulators and other devices, to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base, Nigeria (J.A. 62). At the time, Kirkpatrick had no independent capacity to design, build or supply such a facility. Accordingly, shortly thereafter, Carpenter and Kirkpatrick solicited the services of Defendant Emro, through its president Ruppert, to design the equipment and to provide engineering services incident to the Nigerian contract opportunity (J.A. 62). Likewise, Kirkpatrick lacked the independent ability to manufacture or supply the equipment required by the contract. Thus, Carpenter and Kirkpatrick solicited Nautilus Enviromedical Systems, Inc. ("Nautilus" hereafter), through its President, Defendant Ross E. Saxon ("Saxon" hereafter), to act as the subcontractor, manufacturer and supplier of the medical equipment (J.A. 62).

Plaintiff Environmental Tectonics Corporation, International, is a Delaware corporation having its principal place of business in Southampton, Pennsylvania, and is Kirkpatrick's American competitor (J.A. 56, 63). ETC is engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment and facilities both domestically and to airlines, airports and national air forces outside the continental United States (J.A. 63). In contrast to Kirkpatrick and its corporate relatives, however, ETC has the independent ability to design, manufacture, supply and install both the facility to house the aeromedical service and the component parts (J.A. 63).

On or about February 2, 1981, when ETC learned that the Nigerian Air Force was contemplating the purchase of physiological training equipment and the construction of an aeromedical center at Kaduna Air Force Base, ETC immedi-

ately submitted *pro forma* pricing information to its agent which, in turn, forwarded that pricing information to the responsible Nigerian authorities (J.A. 65, 77).

Regrettably, at about the same time, while ETC was submitting its initial pricing proposal, Defendant Carpenter, on behalf of all Defendants, met with Defendant Benson "Tunde" Akindele and one Alhaji Ringim to discuss a poorly disguised bribe. As appears in Carpenter's contemporaneous memorandum of March 30, 1981, the following occurred (J.A. 212-15):

> At the first meeting with Benson Akindele, we [Defendant Saxon of Nautilus and Carpenter] spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert [of Defendant Emro], at some point in April or early May to finalize technical questions.
>
> We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 .... We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".
>
> We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European con-

cerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.[6]

Ross [Saxon] and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus,[7] and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. . . .

.. this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

* * *

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after

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6. Defendants' bid, as accepted by Nigeria, was for $10,835,048.75 (J.A. 82).

7. Defendants ultimately paid a "commission" of $1,764,019.58 (J.A. 66-67).

receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that . . . the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and assistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

In May 1981, less than two months after the meeting amongst Defendants and their representatives regarding these "commissions", two Panamanian bearer share corporations—Deriks and Los—were established whereby, pursuant to written agreements, Kirkpatrick was to pay them a commission equal to 20% of the prices agreed to be paid by Nigeria for the aeromedical facility (J.A. 36, 64). These Panamanian bearer share corporations were controlled by Defendant Akindele for the sole purpose of receiving the "commission" payments from Defendants and then to distribute the sums thereby received (J.A. 129, 217).

In July 1981, ETC pursued its endeavor to obtain the Nigerian contract by contacting the Armed Forces Attache of the Nigerian Embassy in Washington, D.C. (J.A. 129). In September 1981, ETC's President attended the International Congress on Aviation Medicine in Nancy, France; while there he met with Nigerian Air Force officials and reviewed with them the aeromedical needs at Kaduna (J.A. 129-30). In December 1981 ETC's president travelled to Lagos, Nigeria, for business meetings with Nigerian Air Force officials and to submit a formal bid on the Kaduna aeromedical contract (J.A.

130). In February 1982, ETC's president returned to Lagos and submitted ETC's final formal bid (J.A. 130).

Again, while ETC legitimately sought the Kaduna contract, Defendants pursued their criminal scheme. After creating the two Panamanian bearer share corporations mentioned above, Messrs. Akindele and Ringim continued to meet with Defendants. In particular, Defendants Carpenter and Saxon, acting on behalf of the Defendants, met with Akindele and Ringim through at least March 5, 1982. In fact, Defendants agreed, as of September 1981, that their 20% "commission" on the Nigerian contract would be distributed as follows (J.A. 18, 36):

2½ %—for Akindele
5 %—for air force
2½ %—medical group
5 %—party
2½ %—minister himself
2½ %—other key defense personnel.

On March 19, 1982, a contract was entered into between the Nigerian Ministry of Defense and Kirkpatrick's DISC corporation for purchase of the aeromedical equipment and turnkey construction of the facility at a total price of slightly over $10,800,000 (J.A. 82).

In September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of that contract; immediately thereafter, on September 30, 1982, by use of the United States mails and certain wire transfers, Defendants paid $117,929.34 and $193,657.70, respectively, to the Panamanian corporations, Deriks and Los. The funds were then distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the various Nigerian political and military figures in the agreed-upon percentages (J.A. 19, 37, 66-67).

In December 1982, Nigeria made the next progress payment on the contract; on December 21, 1982, $290,486.50 was funneled to each of the Panamanian corporations by Defendants and distributed to, or on behalf of, Defendant

Akindele and the Nigerian political and military officials (J.A. 19, 37, 66-67).

In February 1983, Nigeria made its next progress payment; payments, each in the amount of $145,243.27, were immediately thereafter made to each of the Panamanian corporations and distributed in the amounts and for the purposes already described (J.A. 19, 37, 66-67).

Finally, in August 1983, Nigeria made its last progress payment and immediately—on August 8, 1983—Defendants caused payments of $290,486.50 to be made to each of the Panamanian corporations and consequent distribution of those funds in the amounts and to the persons as described in Carpenter's March 8, 1982 memorandum (J.A. 19, 37, 66-67). The amounts distributed by Defendants to the Panamanian corporations for the intended "commission" recipients, totalled $1,764,019.58, 20% of the funds received by the Defendant corporations from Nigeria pursuant to the Kaduna contract (J.A. 66).

In April 1983, after learning that its bid price for the aeromedical facility was several million dollars lower than the Kirkpatrick price for the same equipment, ETC investigated the contract award and reported the results to the Nigerian Air Force and to the United States Embassy in Lagos (J.A. 32). Subsequently, the Federal Bureau of Investigation and the United States Justice Department investigated. As a consequence, criminal Informations were filed in the United States District Court for the District of New Jersey (J.A. 15, 33), and a plea bargain was struck involving both Defendant Carpenter and Defendant Kirkpatrick. As to Carpenter, he was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, relating to the December 21 payments referred to above (J.A. 21). As to Defendant Kirkpatrick, it was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, relating to the same December 1982 payments (J.A. 39).

In its Offer of Proof to support the guilty pleas in the United States District Court for the District of New Jersey (Rodriguez, J.), the United States and Defendant Kirkpatrick,

by its present counsel, agreed that the evidence at trial would show that:

> In 1981, Harry G. Carpenter, who was at that time Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.
>
> On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.
>
> Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled by, Akindele to receive the payments from Kirkpatrick.
>
> Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.
>
> In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows: .... [See p. 11, *supra.*) The understanding Akindele communicated to Carpenter was that the payments were to be made to the

above-cited political and military figures in Nigeria in order for W. S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

* * *

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows: .... [See pp. 11-12, *supra*]

The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union International telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

(J.A. 35-37).[8]

Defendant Carpenter was sentenced to pay a fine of $10,000.00 and to perform 200 hours of community service (J.A. 31-32); corporate Defendant Kirkpatrick was sentenced to pay a fine of $75,000 over a period of five years commencing in January 1986 (J.A. 52).

Upon learning of the guilty pleas by Defendants Carpenter and Kirkpatrick, ETC consulted counsel and filed the instant action in the United States District Court for the District of New Jersey on February 26, 1986 (J.A. 4).

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8. An essentially identical Offer of Proof, agreed to both by Defendant Carpenter individually and by his attorney, was filed with respect to Defendant Carpenter (J.A. 17). These Offers of Proof were both before the court below and are of record in the respective criminal proceedings before the United States District Court for the District of New Jersey.

ARGUMENT

SUMMARY OF ARGUMENT

Respondent first contends that the decisions of this Court in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1962), require affirmance in this case because this litigation concerns violations of American law (the Federal Corrupt Practices Act, the Robinson-Patman Act, state and federal Racketeer Influenced and Corrupt Organizations statutes and the common law) by parties subject to the personal and subject matter jurisdiction of American federal courts. Hence, irrespective of the fact that the criminal violations by these Defendants also involve misconduct by foreign officials, those violations are not immune from American judicial examination under the act-of-state doctrine.

Respondent also contends that the conduct placed in issue by this litigation does not—and cannot—constitute an "act of state." That is, the bribes which underlie this civil action—and the receipt of such bribes by agents of the Nigerian government—do not constitute an exercise of sovereign power and, therefore, are not acts of state. Hence, in the absence of an act of state, the act-of-state doctrine provides no basis for a refusal by federal courts to adjudicate litigation before them.

Third, Respondent argues that even if an act of state were found to exist: (a) the *Sabbatino* test is satisfied and the doctrine does not apply; (b) the "commercial activity" exception to the doctrine arises from the facts of this case and the doctrine does not apply; and the State Department's representation to the District Court satisfies both (c) the *Bernstein* exception to the act-of-state doctrine and (d) the distinction between inquiries into the motivations of foreign governments (which are permissible) and inquiries into the legal validity of intraterritorial acts by foreign governments (which are not permissible) so as to make the doctrine inapplicable in any event. That is, in *Sabbatino* this Court defined a two-

pronged test to determine whether application of the act-of-state doctrine is necessary in order to reflect a "proper distribution of functions between the judicial and political branches of the government on matters of foreign affairs." In this instance, application of that two-part *Sabbatino* test demonstrates that proper distribution of functions permits the Judicial Branch to act in this matter.

Further, the "commercial activity" exception to the doctrine is applicable to the facts of this case. The transaction involves merely a contract by a foreign government to buy equipment for its armed forces. Hence, the transaction satisfies the definition of "commercial activity" laid down by Congress in the Foreign Sovereign Immunities Act. Therefore, this Court should construe the act-of-state doctrine in parallel with the Foreign Sovereign Immunities Act.

In addition, the Legal Advisor to the Department of State has informed the courts below that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of this lawsuit. The State Department has thereby satisfied the *Bernstein* exception to the act-of-state doctrine. In any event, the State Department letter has drawn the distinction between permissible inquiries into the motivations for governmental acts as opposed to impermissible inquiries into the validity of the foreign government's acts. That distinction—motivation versus legality—also justifies non-application of the act-of-state doctrine to the facts of this case.

Finally, Respondent urges that the Court accept this opportunity to re-define the act-of-state doctrine. Respondent urges that, in doing so, the Court adopt the rule that, except in the rare instance where the Executive Branch gives an appropriate representation to the court and demonstrates an acceptable justification for a refusal to exercise judicial power, the federal courts treat litigation involving foreign governmental activities no differently than they treat litigation involving activities of American domestic governmental agencies. That is, Respondent urges that in this case, and in every case, the federal courts exercise their power to hear and try cases, save and except in those instances where the Executive

Branch successfully establishes that trial of the case would jeopardize American foreign policy.

I. THE RULE OF LAW REFLECTED IN *UNITED STATES V. SISAL SALES CORP.*, 274 U.S. 268 (1927), AND *CONTINENTAL ORE CO. V. UNION CARBIDE & CARBON CORP.*, 370 U.S. 690 (1962), REQUIRES AFFIRMANCE IN THIS CASE.

As this case demonstrates, in every lawsuit involving illegal overseas payments, it is to be anticipated that the act-of-state defense will be raised by the errant payor. Because the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, makes certain types of payments to representatives of foreign governments unlawful,[9] it is inherent in the proscribed transactions that courts of the United States may be called upon to examine acts done by a government in its own territory. *Cf. Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Specifically, because the Act prohibits the giving or offering of anything of value to a foreign official for the purpose of obtaining or retaining business, 15 U.S.C. §78dd-2(a)(2), litigation involving such conduct will of necessity implicate: (a) the purpose of the offer or the payment and, perhaps, (b) the causative effect of the offer or payment, i.e., whether the offer or payment in fact resulted in the obtaining or retention of business.[10] Thus, if the act-of-state doctrine bars the present civil

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9. The Foreign Corrupt Practices Act also, of course, addresses matters other than the payments themselves, *e.g.*, reporting requirements, and so forth. 15 U.S.C. §78m(b) (1982).

10. To the extent causation must be proven—*i.e.*, that official Nigerian acts were in fact influenced and not merely intended to be influenced—the situation here is not unlike that described by Judge Weis in *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982):

> It appears to us that Curtiss-Wright's concerns are more with difficulties in the production of evidence than with disruption of foreign relations. It is true that plaintifff must prove that damage resulted from the alleged illegal activity. But if the parties cannot obtain direct evidence from the foreign governments, other sources or proof may still be available. See *Continental Ore Co. v. Union Carbide & Carbon Corp*, 370 U.S. at 696-97, 82 S.Ct. at

> 1409. Certainly, at this stage of the litigation, we cannot say that the only relevant and admissible evidence can come from the foreign governments themselves or that they will be uncooperative.
>
> The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations. *See Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d at 55; *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1977). As we have said before, in antitrust litigation there is a public interest in clearing monopolistic activities from the channels of American commerce, even though some of the conduct occurred in foreign countries. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1293.

694 F.2d at 304.

The current state of the record establishes that: Respondent was low bidder for the contract in question and, according to the evidence of its Chief Executive Officer, would have received such contract but for bribes paid by Petitioners. Further, Petitioners received the contract, and received payment thereunder, notwithstanding Respondent's being low bidder. Likewise, immediately upon receiving payments from the Republic of Nigeria, Petitioners made the agreed-upon $1.7 million "commission" payments to the two Panamanian corporations established pursuant to their instructions, and the payments were to be distributed therefrom to government officials in the proportions theretofore authorized by Petitioners.

These facts, standing alone, establish *prima facie* RICO and Robinson-Patman 2(c) violations. See 347 F.2d 1066. For example, in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), a suit by a frustrated competitor against both the bribe giver and bribe recipient, the latter being an official of the State of Idaho, the bribe payor and bribe recipient each testified that the purpose of the payments was not the award of Idaho state business; rather, each said the payments had a different purpose. The District Court rejected these explanations and found, as a fact, that the purpose of the payments was, "at least in substantial part, of influencing [the bribe recipient's] conduct as an employee of [the purchaser] with respect to recommendations . . . for purchase . . ." *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F.Supp. 393, 395 (D. Idaho 1964). Because of the circumstances surrounding the payments—including the secrecy of the payments, the fact that the payments went to the state employee's wife and not directly to such employee, and that the payments stopped when Idaho's purchases stopped—the Ninth Circuit affirmed the factual finding, albeit based upon inference and in the face of explicit denials, that bribes were in fact paid in violation of the Robinson-Patman Act, 15 U.S.C. §13(c). *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d at 854-55. *See also Computer Statistic, Inc. v. Blair*, 418 F.Supp. 1339 (S.D. Tex. 1976).

action, no civil recovery can ever be had against a Foreign Corrupt Practices Act violator.

This conclusion is belied by this Court's decisions in *Sisal Sales* and *Continental Ore*.[11] These decisions establish that where, as here, there is a violation of American law by parties subject to the personal and subject matter jurisdiction of the American federal courts, the malefactors may be "punished"—civilly and criminally—irrespective of the concurrent acts of some foreign government or its officials. *See also, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48, *reh. denied*, 599 F.2d 449 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

In *United States v. Sisal Sales Corp.*, 274 U.S. 268, 271 (1927): "[t]he United States [sought] an injunction to prevent appellees from taking further action in pursuance of a contract, combination or conspiracy said to be forbidden by the Sherman Anti-Trust Act and the Wilson Tariff Act. . . ." Among the facts alleged was that favorable legislation had been secured by the defendants from the Mexican national and Yucatan provincial governments, 274 U.S. at 272-73, whereby defendants were able successfully and profitably to monopolize the sale of sisal in the United States. 274 U.S. at 274.

This Court rejected the monopolists' assertion of the act-of-state doctrine. First, the Court distinguished the act-of-state doctrine as articulated in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), saying:

> The circumstances of the present controversy are radically different from those presented in American Banana Co. v. United Fruit Co., supra, and the doctrine there approved is not controlling here. The Banana Company sued for treble damages under the Sherman Act,

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11. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

> basing its claim upon acts done outside the United States *and not unlawful by the law of the place.*

Sisal Sales at 275-76 (Emphasis supplied).[12]

Then this Court unanimously held:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. *True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.*

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12. Petitioners correctly concede that *American Banana* has been "subsequently discredited" in at least one aspect. Brief for Petitioners at 15. Further, as the United States noted in its Brief as *amicus curiae* filed in response to the Court's Order anent the Petition for a Writ of Certiorari:

> This Court has never clarified the extent to which the holding of *American Banana* survives *Sisal Sales* and *Continental Ore*, although in *Sabbatino* the Court referred to *American Banana* as one of several decisions "directly or peripherally" involving the act of state doctrine that did not "manifest any retreat from *Underhill*" (376 U.S. at 416).[12]
>
> 12. The lower courts have generally concluded that the holding of *American Banana* has survived *Sisal* and *Continental Ore*, although they have sometimes distinguished *American Banana* and found the act of state doctrine inapplicable in the particular case. Compare *Mitsui*, 594 F.2d at 52-54 (doctrine inapplicable), with *Hunt*, 550 F.2d at 73-75 (doctrine applicable), and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. at 109-110 (same).

Brief for the United States as Amicus Curiae at 15-16.

In this case, even if *American Banana* survives *Sisal Sales*, the *American Banana* test is met since the *sine qua non* of the *American Banana* holding—according to this Court's opinion in *Sisal Sales*—is that the acts done in the foreign country be ". . . not unlawful by the law of the [foreign country]", 274 U.S. at 276. Here, of course, the acts of bribery are unlawful under Nigerian law, both as to the payor and as to the recipient. J.A. 348 *et seq.*

274 U.S. at 276. (Emphasis supplied.)

Here, as in *Sisal Sales*, Plaintiff-Respondent complains of a violation of American statutory laws by parties subject to the jurisdiction of the federal courts. These violations, albeit aided by misconduct of foreign officials, are the result of the defendants' own deliberate acts, here and elsewhere, which are prohibited by the Foreign Corrupt Practices Act, by the Robinson-Patman Act, by the federal Racketeer Influenced and Corrupt Organizations Act, by the New Jersey Anti-Racketeering Act and by the common law.

Similarly, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), a private treble damage action under the American antitrust laws for alleged monopolization in the sale and production of vanadium involving, in part, an agency of the Canadian Government, the act-of-state doctrine as reflected in *American Banana* was again raised as a defense. This Court unanimously rejected the defense and interpreted the *Sisal Sales* reading of *American Banana* as saying:

> Since the activities of the defendants had an impact within the United States and upon its foreign trade, American Banana was expressly held not to be controlling.

370 U.S. at 705 (footnote omitted).

By way of explaining rejection of the act-of-state defense, the Court (per Mr. Justice White) went on to say:[13]

> In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's

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13. Noteworthy in this explanation is that the Court specifically observed that no question existed as to "the validity of any action taken by the Canadian Government or by its Metal Controller" or as to the liability of the Canadian Government. 370 U.S. at 706. Here, too, no question is raised as to the validity of the Kirkpatrick-Nigeria contract—*i.e.*, the enforceability of the contract *inter se*—or the liability of the Republic of Nigeria. See 847 F.2d at 1061.

> agent, for Electro Met of Canada was not served. *What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy,* to influence or to direct the elimination of Continental from the Canadian market. *As in Sisal, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.*
>
> . . . The offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities. Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law.[14] There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. (Citations omitted.)

370 U.S. at 706-07 (emphasis supplied).

Here, too, the claim is that the Kirkpatrick defendants are liable for actions which they themselves jointly took, in violation of American law, intending to eliminate—and succeeding in eliminating—ETC from the Nigerian market.

Here, too, the act-of-state doctrine has no place. For this reason alone, the judgment of the court below should be affirmed.

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14. Again, and by way of contrast, the acts committed in Nigeria and in London and in America were *not* permitted by Nigerian law. J.A. 348, *et seq.*

II. THE CONDUCT HERE COMPLAINED OF—BRIBING NIGERIAN OFFICIALS IN VIOLATION OF AMERICAN LAW, IN VIOLATION OF NIGERIAN LAW, AND IN VIOLATION OF EVERY KNOWN STANDARD OF INTERNATIONAL CONDUCT—DOES NOT CONSTITUTE AN ACT OF STATE.

As a threshold proposition, for the act-of-state doctrine to apply, an act-of-state *qua* act-of-state must be placed in issue. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *Republic of Philippines v. Marcos,* 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom., Ancor Holdings, N.W. v. Republic of Philippines,* 480 U.S. 942, and *cert. denied,* 481 U.S. 1048 (1987); *Republic of Philippines v. Marcos,* 862 F.2d 1355, 1360-1361 (9th Cir. 1988) *(en banc), cert. denied,* 109 S. Ct. 1933 (1989); *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir. 1962).

There is, of course, unanimity in this Court on that elementary proposition as reflected in the Court's most recent act-of-state ruling: *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976).[15] For the Court (including Mr. Justice Stevens, concurring, 425 U.S. at 716), this reasoning is reflected in the following passage:

> We thus disagree with the Court of Appeals that the mere refusal of the interventors to repay funds followed by a failure to prove that interventors "were not acting within the scope of their authority as agents of the Cuban government" satisfied respondents' burden of establishing their act of state defense. *Menendez v. Saks & Co.,* 485 F.2d, at 1371. Nor do we consider *Underhill v. Hernandez,* 168 U.S. 250 (1897), heavily relied upon by the Court of Appeals, to require a contrary conclusion. In that

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15. While *Alfred Dunhill* reflects a difference of view within the membership of the Court as to the existence *vel non* of a "commercial activity" exception to the act-of-state doctrine, the decision narrowly turns on whether the party with the burden of proof in that case—the Respondent Republic of Cuba—had met its burden. See Opinion of Mr. Justice Stevens, concurring, 425 U.S. at 716.

> case and in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918), it was apparently concluded that the facts were sufficient to demonstrate that *the conduct in question was the public act of those with authority to exercise sovereign powers* and was entitled to respect in our courts. We draw no such conclusion from the facts of the case before us now. As the District Court found, the only evidence of an act of state other than the act of nonpayment by interventors was "a statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment." *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F.Supp. at 545. But this merely restated respondents' original legal position and adds little, if anything, to the proof of an act of state. No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had *as a sovereign matter* determined to confiscate the amounts due three foreign importers.

425 U.S. at 694-95 (emphasis supplied) (footnote omitted).

For the dissenting members of the Court, Mr. Justice Marshall wrote:

> If the foreign state has exercised a sovereign power either to act or to refrain from acting there is an act of state.

425 U.S. at 720 (Marshall, J., dissenting).

Hence, the first inquiry must be: Is there an act of state placed at issue here? The answer to that inquiry is: No. The criminal act of offering and paying bribes is not entitled to protection—is not a public act; the criminal act of receiving bribes is not an exercise of sovereign power.[16]

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16. It bears repetition that this case does not address the validity *vel non* of the Kirkpatrick-Nigeria contract. The focus is on—and must stay on—the bribe-paying conduct of the defendants. It is, of course, clear however that the *receipt* of the bribe by the Nigerian officials was (and is) a

Two decisions of the Courts of Appeals aptly illustrate this proposition in the context of official corruption: *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), and *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986).[17] In *Jimenez*, the former president/dictator of Venezuela sought *habeas corpus* relief from an extradition order contending that financial dealings found by the District Court to be "crimes" within the relevant extradition treaty were not, in law, subject to review because of the act-of-state doctrine, *i.e.*:

> Appellant contends that the acts with which he is charged are "acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456, was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality".

Jimenez, 311 F.2d at 557 (footnote omitted).

The Fifth Circuit rejected this argument, noting:

> [District Court] Judge Whitehurst expressly found that the acts of appellant establishing probable cause of guilt of the financial crimes were "for the private financial benefit of the defendant."

311 F.2d at 558.

The Fifth Circuit then opined:

> Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief

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criminal offense under the laws of that nation. J.A. 348-352. Indeed, Defendant Akindele (a Nigerian national, J.A. 18, 35, 57) committed a criminal offense under Nigerian law when he caused the Panamanian bearer share corporations, Deriks and Los, to accept the bribes paid by the Kirkpatrick defendants, irrespective of the ultimate disposition of the funds. J.A. 350-351.

17. These cases involve the recipients of the bribes/corruption; the present case involves the payors.

executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies.

* * *

Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was "for the private financial benefit" of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State".

311 F.2d at 557-58.

The relevant holding in *Jimenez* was:

The acts constituting crimes charged for which the extradition of appellant is sought are not "acts of Venezuela" as in Hernandez, and the Act of State Doctrine is no bar to this extradition proceeding or justification for the discharge from custody of appellant.

311 F.2d at 558.

The Second Circuit reached the same conclusion in *Marcos*, 806 F.2d 344 (2d Cir. 1986). There, an appeal was taken from an injunction affecting title to five parcels of real estate acquired by, and beneficially owned by, former Philippine President Ferdinand Marcos. The land purportedly was acquired with funds received, at least in part, via bribes and kickbacks, *id.* at 346-48. As one defense, the defendants urged the act-of-state doctrine saying that the doctrine "prohibits adjudication in our court of the legality of the acts of a foreign head of state within his own country", *id.* at 357. After first alluding to the basic tenets of the doctrine, the Second

Circuit focused on the central proposition that the doctrine pertains only to "public acts of the *sovereign*" (*id.* at 358) (emphasis in original), and concluded:

> Appellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts. Although the distinction between public and private acts of a foreign official may be difficult to determine, our courts have repeatedly done so. *See Dunhill*, 425 U.S. at 695, 96 S.Ct. at 1862 ("Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach.") (citations omitted).
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> * * *
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> In short, the district court will necessarily scrutinize the acts that The Republic challenges. Defendants must present evidence that these acts were public (e.g., that Marcos's wealth was obtained through official expropriation decrees or public monopolies). The court then must decide whether to examine these public acts in light of the considerations discussed above. If it chooses not to do so—and the determination whether the Marcoses obtained their wealth illegally, and hence the determination of ownership of the property at issue in this case, is impossible without such scrutiny—the court should consider defering to a Philippine adjudication that comports with due process. But in any event, at this stage we agree with the position of the United States quoted above that the defendants have not discharged their burden of proving an act of state. Only after that burden is met do other relevant factors need to be considered.

806 F.2d at 359-60.

Commentators who have addressed the interrelationship between questionable overseas payments and the act-of-state doctrine likewise agree that no act-of-state, *qua* act-of-state, is

implicated in the payment, or receipt, of bribes.[18] For example, even before enactment of the Foreign Corrupt Practices Act, Prof. Charles R. McManis, wrote as follows:

> International comity and separation of powers, the underpinnings of the act of state doctrine, argue for applying it only where the alternative is judicial evaluation of the validity of an exercise of public authority—a judicial ruling, a legislative enactment, a regulatory decree, or an executive use of police powers. . . . [T]he local legality and authoritativeness of an official's conduct should be considered in deciding whether that conduct was an act of state. Since acceptance of corporate payments seems to violate foreign laws and, judging from the recent reactions of foreign governments, to overstep the limits of official authority, it would be inappropriate to invoke the

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18. In fact, one commentator, Prof. Michael J. Bazyler, foretold the decision of the District Court here:

> Another important federal law regulating the practice of American business in the international marketplace is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA prohibits the payment of bribes by American businesses to officials of foreign governments on the grounds that such activities hurt rather than help our foreign commerce. The executive branch, through the Justice Department, enforces the Act by bringing suit against the American offender. The FCPA has also been interpreted to include a private enforcement mechanism that permits private parties to file suit for damages.
>
> Private litigants may find, however, that their suits are barred by the act of state doctrine. Since the violation is, by definition, a payment to a foreign official, inherent in every private suit under the FCPA is the involvement of a foreign government. Adjudicating FCPA enforcement actions will nearly always require an examination of the reasons for the payment and the motivation of the foreign official in accepting the payment. Courts might therefore invoke the act of state doctrine as a convenient excuse to avoid deciding difficult FCPA cases.

Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 380-81 (1986) (footnotes omitted).

act of state doctrine to protect corporations that induce such conduct by government officials.

McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 Yale L.J. 215, 236-37 (1976) (footnotes omitted).

See also Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 Va. J. Int'l Law 211, 251-52 (1987); Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L.J. 407 (1984); Note, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 Am. U.L. Rev. 203 (1984); Note: *Int'l Law-Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?*, 59 Notre Dame L. Rev. 455 (1984).[19]

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19. In defining the act-of-state doctrine, §443 of *The Restatement (Third) of the Foreign Relations Law of the United States* (1987), similarly requires a threshold determination that the acts sought to be placed under scrutiny be "acts of a *governmental character* done by a foreign state within its own territory and applicable there." (Emphasis supplied.) *Comment i* further expands on the substance of, and procedure as to, this initial determination:

> *i. Form and proof of act of state.* The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts, such as occupation of an estate by the state's armed forces in application of state policy. An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character. An action or declaration by an official may qualify as an act of state, but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state. . . . The burden of establishing the act and its character as an act of state is on the party invoking the doctrine. The act of state doctrine does not preclude an initial inquiry as to whether a challenged act is in fact an act of state, whether scrutiny of the act is necessary to a litigant's claim or defense, or whether one of the suggested exceptions to the doctrine applies.

The *Restatement* does not address itself to questions of bribery or extortion

There is, of course, no doubt that bribery/extortion is *not* a public act and is *not* an exercise of sovereign power.[20]

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but does, in Section 443, *Comment c*, describe a somewhat analogous situation of universal condemnation:

> A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.

20. "Virtually every nation treats bribery of its officials as a crime. J. Noonan, Bribes 702 (1984); Driscoll, The Illegality of Bribery: Its Roots, Essence and Universality, 14 Cap. U.L. Rev. 1,13-38 (1984); Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad, 10 Cornell Int'l L.J. 231, 235 & n. 26 (1977); see also Goldstein, European Views of United States Anti-Bribery and Anti-Boycott Legislation, 1 Nw. J. Int'l L. & Bus. 363 (1979) (every major European nation prohibits bribery of its officials); Suse, Questionable Payments in the Middle East: Potential Liability of American Corporations, 4 J. Comp. Corp. & Sec. Reg. 101 (1982) (examining anti-bribery laws of seventeen Middle Eastern nations). Somewhat less consensus exists with respect to bribing employees of private enterprises; *i.e.*, commercial bribery. Many nations also treat this as a crime. See, e.g., The Prevention of Corruption Act, 1906, 6 Edw. 7, ch. 34, amended by the Prevention of Corruption Act, 1916, 6 & 7 Geo. 5, ch. 64; Code pénal arts. 177, 179 (Fr.): Gesetz gegen den unlauteren Wettbewerb §12, 1909 Reichsgesetzblatt [RGB1] 499, 502 (as amended) (W. Ger.) (Act Against Unfair Competition); see generally 1 Pinner's World Unfair Competition Law Topic No. 12, Bribery (H. Dawid 2d ed. 1978) (survey of foreign commercial bribery law). For a discussion of U.S. federal and state laws criminalizing commerical [sic] bribery, see Perrin v. United States, 444 U.S. 37, 41-45 (1979). Even where such conduct is not criminal, it typically gives rise to civil liabilities. See generally H. Lidgard, C. Rohwer & D. Campbell, A Survey of Commercial Agency 32, 66, 126, 216, 434-35, 480-81 (1984). No nation other than the United States, however, prohibits bribery of another country's officials or bribery occurring outside its territory. Noonan, supra, at 680; see also Goldstein, supra, at 364 (no western European nation has such a statutory prohibition)."

Gevurtz, *supra*, at 212-13, n. 4.

Indeed, in the course of Congressional hearings leading to the enactment of the Foreign Corrupt Practices Act, Gen. (ret.) John J. McCloy, Chairman of the special review committee which investigated Gulf Oil's political contributions abroad, made the following statement:

> In the course of the Gulf committee's investigation, we could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country.

Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 6 (1976).

Article 38, ¶1(c) of the Statute of the International Court of Justice proscribes bribes; at least 65 sovereign nations proscribe bribes;[21] and various international resolutions, treaties, concordats and agreements of the United Nations, the Organization of American States, the Organization for Economic Cooperation and Development, and the International Chamber of Commerce all reflect the universal, unanimous conclusion that bribery is unacceptable behavior in the modern business world.[22] Indeed, the American Foreign Corrupt Practices Act is a unique expression of this universal morality in its attempt to control extraterritorial corruption by domestic corporations and American citizens. *See* Gevurtz, *The United States Approach to Combating Bribery in the International Sale of Goods*, Survey of the Int'l Sale of Goods 333, 337-43 (1986).

Congress, of course, found bribery to be unethical, to cause the public to lose confidence in the free market system, to taint the credibility of American corporations, and to *cause*

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21. *See*, Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 Cornell Int'l L.J. 231, 235-36 (1977).

22. See, Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L.J. 407, 420-21, n. 105-08, for a collection of relevant international public documents.

foreign policy problems for the United States by causing embarrassment with friendly nations and by reinforcing (or at least aggravating) suspicion as to American motives in less friendly nations.[23] Hence, to remedy these problems, Congress enacted the Foreign Corrupt Practices Act.

It would be incongruous now to conclude, as Petitioners urge, that conduct universally condemned by the business world (indeed, by the world irrespective of its "business" nature) and made subject to specific criminal sanctions by the American Congress, is somehow transmogrified into a public act of sovereign authority to be screened from judicial attention in the American courts. The admitted acts of the Kirkpatrick defendants are, without more, violations of the Foreign Corrupt Practices Act, of the RICO Statute, of the Robinson-Patman Act, of the New Jersey RICO statute, and of the common law. They are criminal acts and civil wrongs, not acts of state.[24]

III. ASSUMING, *ARGUENDO*, THE PRESENCE HERE OF AN ACT OF STATE, THE *SABBATINO* TEST IS SATISFIED AND THE DOCTRINE DOES NOT APPLY TO THIS CASE.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court, per Mr. Justice Harlan, sought to restate the jurisprudential principle under which American courts

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23. See, *passim*, H.R. Rep. No. 640, 95th Cong., 1st Sess. (1977); S. Rep. No. 114, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 4098; S. Rep. No. 1031, 94th Cong., 2d Sess. (1976).

24. Given Petitioners' suggestion of Nigerian public interest in not disclosing corruption, Brief for Petitioners 32-33, it is worth noting that the Nigerian government in power at the time of this contracting was ousted by a coup on the last day of 1983 with the result that, "[t]here was widespread relief that a corrupt and inefficient government had been removed with little bloodshed." 1985 Britannica Book of the Year 471. And, as appears from this record, the Republic of Nigeria is fully informed as to the specific allegations of this case, J.A. 45-46, 124, but has taken no steps to intervene or interfere with the proceeding in any way. Hence, it seems unlikely that Nigeria fears any embarrassment in having further disclosure of corruption under a predecessor regime.

will adjudicate matters which bring into question the governmental acts of foreign sovereigns. In doing so, the Court rehearsed the "classic" American statement of the act-of-state doctrine found in *Underhill v. Hernandez*, 168 U.S. at 252, as further elucidated by this Court in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 297 (1918). *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 416-18.[25]

Having declared that the act-of-state doctrine is neither compelled by the "inherent nature of sovereign authority . . . or by some principle of international law . . . or the text of the [United States] Constitution . . .", 376 U.S. at 421, 423, the Court went on to define the rationale for the act-of-state doctrine:

> The act of state doctrine does, however, have 'constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

376 U.S. at 423.

In order to determine whether the act-of-state doctrine

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25. In this case, in contrast to the "classic" act-of-state cases in this Court, the validity of no governmental action is called into question—*i.e.*, no attempt is made in this litigation to rescind the commercial contract between Petitioner and the Republic of Nigeria nor is any claim made for compensation from Nigeria itself. Neither are there questions of "title" to real estate or tangible or intangible property raised here. Hence, the "classic" concerns reflected in *Underhill, Oetjen* and *Ricaud* are not present here. It is, therefore, appropriate to commence an analysis of this case with this Court's decision in *Sabbatino*.

appropriately reflects the "proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs," 376 U.S. at 427-28, the Court identified two controlling variables:

> [1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . [2] It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches

376 U.S. at 428;
and rendered its narrow holding on the facts of the case as follows:

> [W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id.

In *Sabbatino,* in considering the first variable—"the degree of codification or consensus concerning a particular area of international law"—this Court said:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.

Id. (footnote omitted).

In this case, and in contrast, present international opinion is unanimous that bribery, extortion and corruption of governmental processes—be they foreign or domestic—are intolerable. See, *supra,* pp. 30-32. In this very case, it is stipu-

lated that bribery—offering or giving gratification to a public servant—or the profiting from such bribery is a violation of Nigerian criminal laws punishable, at the time of these offenses, by, respectively, imprisonment of three years and/or imposition of a fine or imprisonment for one year and/or imposition of a fine. J.A. 348, *et seq.* Indeed, at no time during the criminal proceedings related to this case, or during the civil proceedings below, have Petitioners ever sought to deny the criminality of their conduct. Hence, the first variable upon which application of the act-of-state doctrine depends as identified in *Sabbatino*—the degree of codification or consensus concerning the particular area of law—is fully satisfied here. Accordingly, consideration of that variable under the *Sabbatino* formulation dictates that the act-of-state doctrine not apply to this case.

The second consideration identified in *Sabbatino* as being pertinent to application of the act-of-state doctrine is the importance of the issue for American foreign relations. 376 U.S. at 428. In *Sabbatino*, this Court determined that that variable dictated application of the act-of-state doctrine, in essence because of: (a) the Executive Branch's failure to take a position in the context of the *Sabbatino* litigation on the substantive issue of the legality of Cuba's expropriation; (b) the existence of claims to compensation by many other American citizens, almost none of which were before the courts; and (c) the questions of title which would arise as to many disparate properties, only one of which (belonging to one litigant) was before the Court. In short, the *Sabbatino* Court discerned a serious risk of confusion—even, perhaps, conflict—between the Judicial and the Executive Branches were the courts to render a decision on the validity of Cuba's expropriation of property.

Here, to the contrary, there is no such risk of confusion or conflict. First, and foremost, the conduct in question is not that of the sovereign state of Nigeria; it is the conduct of American corporations and individuals, Petitioners here.[26]

26. Suggestions are made throughout Petitioners' filings with this Court that the contract award will have to be shown—by direct evidence—

Second, the conduct in question has been exposed fully in the American criminal prosecution (J.A. 15, 33).

Third, there are no other claims against Nigeria on behalf of other American citizens arising out of this transaction.

Fourth, there are no title questions.

Fifth, the Executive Branch, by the letter response of Judge Sofaer to District Judge Lechner, has taken the straightforward position—in contrast to its "no comment" position in *Sabbatino*— that this litigation may proceed without threatening foreign relations with the Republic of Nigeria. J.A. 267. Judge Sofaer said:

> As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

J.A. 268-69.

Sixth, and finally, the fact of the litigation and the claims thereby asserted, as well as the conduct of the Nigerian officials thereby ostensibly placed in question, have been placed squarely before the Nigerian Ambassador as of July 31, 1986, J.A. 124, and there have been no objections by the Republic of Nigeria to the pursuit of this litigation to date.

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to have been the result of bribes in fact paid by Petitioners to one or more Nigerian high-level government officials. Such, of course, is not the case. See fn.10, *supra*.

To the extent Petitioners seek to interpose the contention that bribery was a *sine qua non* of transacting business with the Republic of Nigeria and that Respondent would not have received the contract but for such payments, both of which propositions are denied by Respondent, such contentions are matters of affirmative defense as to which Petitioners bear the burden of proof. Thus, the focus of the "act" in question must be on the conduct of the American corporations and their representatives, not on the conduct of any foreign government official.

In a word, consideration of the second variable identified by the *Sabbatino* Court as being pertinent to application of the act-of-state doctrine likewise demonstrates that this litigation, and the issues presented thereby—the endeavors of an American corporation to corrupt the government of a Third World country—have no implications whatsoever as to the foreign relations between the United States of America and the Republic of Nigeria.

In sum, application of the *Sabbatino* formulation of the act-of-state doctrine, and its twin variables, to the facts in this case points unequivocally to the justiciability of this dispute, the duty of the courts below to hear and resolve the questions presented, and the inapplicability of the act-of-state doctrine.[27]

IV. FURTHER ASSUMING, *ARGUENDO*, THE PRESENCE OF AN ACT-OF-STATE HERE, AND ASSUMING THE APPLICABILITY OF THE DOCTRINE TO THESE FACTS, A "COMMERCIAL ACTIVITY" EXCEPTION TO THE DOCTRINE SHOULD BE ADOPTED BY THIS COURT AND APPLIED TO THE FACTS OF THIS CASE.[28]

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27. The *Sabbatino* analysis—both in this Court's opinion and in the foregoing discussion—continues to apply even after *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), and *Alfred Dunhill of London v. The Republic of Cuba*, 425 U.S. 682 (1976). In each of those cases, irrespective of the "splintered decisions" (Brief for the United States as *amicus*, p. 8), the four dissenting Justices explicitly adhere to the *Sabbatino* analysis, *see, e.g.*, 406 U.S. at 789 (Brennan, J., dissenting), and the plurality opinions adhere to the core of *Sabbatino* while identifying—and seeking to apply—exceptions to the applicability of the doctrine as so defined. Ergo, the analysis in the text, supra, whereby the *Sabbatino* standard is applied to the facts of this case satisfies the underpinnings of both *First National City Bank and Alfred Dunhill*.

28. Various exceptions to the act-of-state doctrine, in addition to the commercial activity exception, have been identified by the commentators and employed by the courts. *See, e.g.*, Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986); and *Modern Status of the Act of State Doctrine*, 12 ALR. Fed. 707 (1972, 1988 Supp.). One of the excep-

In *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976), four Justices of this Court, speaking through Mr. Justice White, declined to extend the act-of-state doctrine to acts committed by foreign sovereigns in the course of their purely commercial activities (425 U.S. at 707).[29] There, adopting arguments advanced by the Solicitor General of the United States, taking into account expressions of Executive Branch principles of sovereign immunity going back as far as the Tate letter of 1952, and considering the established line of authority distinguishing governmental actions of sovereign states on the one hand from their private and commercial acts on the other, the Court found no basis for imposition of an act-of-state preclusion to justiciability. 425 U.S. at 706.

The case involved the question whether the Republic of Cuba was subject to a money judgment for funds remitted to

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tions—the fraud or corruption exception—is more correctly seen not as an exception to, but as a negation of, the act-of-state concept and is, therefore, addressed at pp. 23-32, *supra*, of this Brief. A second exception—the motivation vs. validity exception—was relied on both by the State Department in Judge Sofaer's letter and by the court below. Respondent concurs with the existence of the exception and with its applicability to the facts of this case. In addition, Respondent relies on the explication of the exception and its application to the facts of this case as set forth in the merits Brief of the United States as Amicus Curiae in this case. A third exception—the so-called *Bernstein* exception—was accepted by three Justices of this Court in *First National City Bank* where this Court said, per Mr. Justice (now Chief Justice) Rehnquist:

> [W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.

406 U.S. at 768.

Were the *Bernstein* exception to be adopted by this Court in the instant case, the decision of the court below must, obviously, be affirmed. That is, Judge Sofaer's letter to the District Judge below satisfies this rule. See, also, *infra*, pp. 46-50.

29. The decision of the Court, of course, turned on the joinder by Mr. Justice Stevens in the conclusion of the four Justice plurality that there was a failure to prove an "act of state" below. 425 U.S. at 716.

Cuba post-expropriation for cigars shipped to, and received by, the remitting American importers *before* expropriation. 425 U.S. at 687. In opining that the refusal of Cuba to return the mistakenly paid funds was not a public act but was merely a commercial act, to which the act-of-state doctrine does not apply, Mr. Justice White wrote:

> Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach.

425 U.S. at 695.

> It is the position of the United States, stated in an *amicus* brief filed by the Solicitor General, that such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts.

425 U.S. at 696.

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S., at 427-428, 431-433. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be

recognized as an act of state and immunized from question in our courts.

Although it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.

425 U.S. at 697-98.

Since that time, as we have said, the United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments.

425 U.S. at 701-02.

[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04 (footnote omitted).

For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign

> immunity". In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino, supra,* 376 U.S., at 401 (emphasis added), and that it applies to "acts done within their own States, in the exercise of *governmental* authority." *Underhill v. Hernandez,* 168 U.S., at 252 (emphasis added). We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state.

425 U.S. at 705-06 (footnote omitted).

Then, subsequent to this Court's decision in *Alfred Dunhill,* Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-11.[30] This Court has described Congress' interest in passing the Act as follows:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing

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30. Congress' findings as to, and declaration of purpose for, the statute are as follows:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1602.

> standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R.Rep. No. 94-1487, p. 7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.
>
> For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity.

Verlinden B.V. v. Central Bank of Nigeria, 416 U.S. 480, 489 (1983).[31]

> Amongst the provisions of the Act is the following:
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> . . . [where the] action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. §1605(a)(2).

In the definition section of the Act, the following appears:

> A "commercial activity" means either a regular

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31. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), of course, this Court has unanimously ruled that even though the Foreign Sovereign Immunities Act did not "control the determination" of the issue there presented, "our resolution of that question [whether Citibank might set off the value of its seized Cuban assets against Bancec's claim] is guided by the policies articulated by Congress in enacting the Foreign Sovereign Immunities Act." 462 U.S. at 621. See, also, 462 U.S. at 628, 629. No act-of-state issue was raised in that case. 462 U.S. at 635, n. 28.

> course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. 1603(d).

Hence, if the instant transaction—the sale by an American corporation of aeromedical supplies and equipment to the Republic of Nigeria for use by the Nigerian Air Force—constitutes "commercial activity" within the foregoing definition, Nigeria would not itself be immune from suit if litigation were instituted in America with respect to a breach of the contract—*e.g.*, non-payment—by Nigeria.

The transaction is, notwithstanding the opinion of the court below, "commercial activity":[32]

> The legislative history of FSIA specifically establishes that a transaction retains its commercial nature even though the purchasing government proposes to use the goods for military purposes:
>
> > As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. *Thus, a contract by*

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32. In the court below, ETC argued the applicability of the "commercial activity" exception. The court below, mandated to do so by Third Circuit Internal Operating Procedure 8C, rejected the argument on the authority of its earlier decision in *Williams v. Curtiss-Wright*, 694 F.2d at 302, saying:

> While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental.

J.A. 328; 847 F.2d at 1059.

We respectfully disagree. We believe the correct reading of "commercial activity" is to be founded in Mr. Justice White's opinion in *Alfred Dunhill*, in the legislative history of the Foreign Sovereign Immunities Act and in the cases collected in *McDonnell Douglas Corp. v. Islamic Rep. of Iran*, 758 F.2d 341, 349 (8th Cir. 1985).

> *a foreign government to buy* provisions or *equipment for its armed forces or to construct a government building constitutes a commercial activity.* The same would be true of a contract to make repairs on an embassy building. *Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.*

H.Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615 (emphasis added).

McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 348-49 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985).

Thus, in the *McDonnell Douglas* case, *supra*, where the transaction involved "the sale of certain parts for damaged F-4 aircraft" and Iran asserted a sovereign immunity defense to McDonnell Douglas' declaratory judgment action concerning liability *vel non* for breach of a sales agreement with the Iranian Air Force, the Court of Appeals, having alluded to the foregoing legislative history, noted that:

> [S]everal cases construing FSIA also make clear that a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply

758 F.2d at 349;[33]
and ruled

> In sum, the language of FSIA, its legislative history and recent case authority all confirm conclusively that the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction out-

33. The cited cases are: *Texas Trading & Milling v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Behring Int'l v. Imperial Iranian Air Force*, 475 F.Supp. 383 (D.N.J. 1979); *National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622 (S.D.N.Y. 1978).

> side of the "commercial" exception to sovereign immunity. Accordingly, the district court's rejection of Iran's sovereign immunity claim is affirmed.

Id.

In short, the instant transaction does involve "commercial activity" and Nigeria, were it a party to this lawsuit (or any suit concerning the contract), would not enjoy the defense of sovereign immunity.

> [T]he commercial exception enacted in the FSIA logically compels that a similar exception to the act of state doctrine be recognized. The FSIA embodies an implicit legislative judgment that suits against foreign governments based upon their commercial activities are not detrimental to U.S. foreign policy interests. To dismiss such suits on the ground that they require review of acts of state contravenes this judgment. It is even more unjustified to preclude actions against private defendants because they involve activities for which the foreign states themselves enjoy no immunity. . . . [B]ribery to influence government procurement should not be beyond judicial review.

Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 Virginia Journal of Int'l Law 221, 255-56 (1987) (footnotes omitted).

Indeed, as Professor Gevurtz notes:

> It is true that Congress did not expressly engraft a commercial activity exception onto the act of state doctrine when it passed the FSIA. Nevertheless, no negative implication can be taken from this fact. The legislative history suggests Congress was under the impression that such a step was unnecessary for it thought that the courts had already recognized this exception. H.R. Rep. No. 1487, supra note 243, at 20 n.1, reprinted in 1976 U.S. Code Cong. & Admin. News at 6619 n. 1.

Gevurtz, *id.*, at 256, n. 252.

Accordingly, where, as here, the foreign government can-

not itself avoid responsibility in civil litigation under the terms of the Foreign Sovereign Immunities Act, a private party likewise may not avoid liability by virtue of the act-of-state doctrine. For this reason, this Court should adopt—and apply to this case—a commercial activity exception to the act-of-state doctrine coextensive with the "commercial activity" exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act.

V. A PROPOSAL AS TO REDEFINITION OF THE ACT-OF-STATE DOCTRINE.

While the Court has not specifically ordered counsel to brief the question "Should this Court's holding in [*Sabbatino*] be reconsidered?",[34] and while the judgment of the court below may be affirmed on any of the grounds set out in the preceding portions of this Brief, Respondent respectfully urges a reconsideration of—and redefinition of—the doctrine so as to guide future litigants in general, the lower federal courts and, in particular, the future progress of this case.

Simply put, Respondent urges the adoption of the dissenting opinion of Mr. Justice White in *Sabbatino*, at least insofar as it: (a) addresses the "unassailable propositions" that constitute the underpinning of the act-of-state doctrine (376 U.S. at 450-51); and (b) provides the procedure for appropriate Executive Branch intervention on a "reverse *Bernstein*" basis, 376 U.S. at 467-68.[35]

The "unassailable propositions" are, of course:

> . . . that our courts are obliged to determine controversies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law.

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34. *Compare Alfred Dunhill*, 425 U.S. at 690-91 n. 5.

35. A "reverse *Bernstein*", as opposed to the classic *Bernstein*, approach would avoid the Constitutional issues sometimes urged against the classic *Bernstein* approach (see, *e.g.*, Brief for Petitioners at 35) and would, in any event, avoid the "errand boy" concern expressed, *inter alia*, by Mr. Justice Douglas. *First National City Bank, supra*, 406 U.S. at 771.

Sabbatino, 376 U.S. at 450-51.

Key to this concept, obviously, is that the courts are "obliged" to determine controversies. It is unseemly that an American citizen—Environmental Tectonics Corporation—might be deprived of its deserved monetary relief by the fortuitous fact that other American citizens—the defendant Kirkpatrick corporations—bribed officials of a foreign country, instead of bribing officials of a private corporation, be it domestic or foreign, or officials of an American governmental agency.

As Judge Kaufman noted for the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), Congress intended to regularize and ensure "access to the courts" in cases encompassed by the Foreign Sovereign Immunities Act, 647 F.2d at 312-13, quoting from *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6605-06. ETC should be entitled to no less "access to the courts" against these Defendants.

The recently enacted statute concerning American judicial enforcement of arbitration agreements and awards in international trade likewise demonstrates a greater Legislative Branch confidence in the abilities of the Judicial Branch to apply the law than the Judicial Branch apparently has in itself when it applies the act-of-state doctrine. Pub. L. 100-669, §1, Nov. 16, 1988, 102 Stat. 3969, codified as 9 U.S.C. §15.[36] That is, were this a dispute subject to arbitration, ETC would be entitled to access to the courts; ETC is entitled to no less on the facts of this case.

The courts were created by Article III, §2, of the United States Constitution for the purpose of hearing "all cases" and

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36. Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. §15.

"controversies" between citizens of the several States. The enactment by Congress of, *inter alia*, the Foreign Sovereign Immunities Act, as well as the Second Hickenlooper Amendment, 22 U.S.C. §2370(e)(2), validated the wisdom of Mr. Justice White's views. Indeed, the search for exceptions to the act-of-state doctrine by the Courts, and the near-Talmudic exegetical exercises by the commentators with respect to the doctrine, themselves bespeak the desirability of a turn to a simpler, clearer approach [37] In truth, save and except litigants such as Petitioners here, and the *amicus* Republic of China, it is well nigh impossible to find an advocate for the doctrine in its present form.

Second, the procedure suggested by Mr. Justice White would, of course, put the onus on the State Department to ". . . render a determination [as to applicability of the doctrine] after reasonable notice, in each case . . .":

> Such an examination would permit the Department to evaluate whether adjudication would "vex the peace of nations," whether a friendly foreign sovereign is involved, and whether settlement through diplomacy or through an international tribunal or arbitration is impending. Based upon such an evaluation, the Department may recommend to the court that adjudication should not proceed at the present time. Such a request I would accord considerable deference and I would not require a full statement of reasons underlying it. But I reject the contention that the recommendation itself

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37. An article to be published in the November 1989 issue of The Villanova Law Review, Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. ___ (manuscript dated 9/6/89), collects most—if not all—the decisional authority and learned commentary to date on the doctrine. (Curiously, the article does not include a discussion of the motivation versus validity distinction.) Even if one rejects some or all of the theses expounded in the article (as we do), it does demonstrate beyond peradventure the confusion surrounding the act-of-state doctrine and the need for redefinition, in particular a redefinition which is clear, simple in application and not likely to lead to further demands on this Court's docket. Hence, the proposal herein.

> would somehow impede the foreign relations of the United States or unduly burden the Department.

Sabbatino, 376 U.S. at 468.[38]

The District Court's judgment in response to the State Department's recommendation would, of course, be subject to review under an abuse of discretion standard. Indeed, the procedure conceptualized by Mr. Justice White and urged here is precisely that adopted by Congress in the Second Hickenlooper Amendment, 22 U.S.C. §2370(e)(2). There, if the Executive deems act-of-state concerns to be implicated, the court *shall* decline to act *provided* the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. §2370(e)(2).

So, too, for the usual grist of the litigation mill as it touches upon foreign nations, especially in this age of burgeoning internationalism: if the Executive has a legitimate interest in superimposing a foreign relations stopper on a lawsuit, let it say so; otherwise, such lawsuits are like—and should be treated like—any other.

As Mr. Justice Powell said, while concurring in *First National City Bank*:

> Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. This view is not inconsistent with the basic notion of the act of state doctrine which requires a balancing of the roles of the judiciary and the political branches. When it is shown that a conflict in those roles exists, I believe that the judiciary should defer because, as the Court suggested in

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38. Presently, of course, the Attorney General must receive notice of any claim asserting the unconstitutionality of any federal statute. 28 U.S.C. §2403. There seems to be no impediment to instituting a similar procedure as to act-of-state claims whereby notice to the appropriate official at the State Department would be required.

> *Sabbatino*, the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.
>
> In this case where no such conflict has been shown, I think the courts have a duty to determine and apply the applicable . . . law.

406 U.S. at 775-76.

In sum, international developments since the decision in *Sabbatino*, the experience of the courts in attempting to limn the boundaries of the act-of-state doctrine, and the Congressional enactments reflected in the second Hickenlooper Amendment, in the Foreign Sovereign Immunities Act, and in the Arbitration Act Amendment all point in the same direction: a need for the federal courts to adhere to their usual Constitutional duty to hear and decide cases subject to a discretionary refusal to exercise jurisdiction when confronted with a compelling reason for such refusal, appropriately articulated by the Executive Branch.

CONCLUSION

For each of the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 87-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners submit this brief in reply to respondent and to the United States and the American Bar Association as *amici curiae* for respondent.

SUMMARY OF THE ARGUMENT

By whatever approach to the act of state doctrine this Court adopts — by reasons of comity, separation of powers, choice of law or *stare decisis* — the result should be the same: Environmental Tectonics Corporation (hereinafter referred to as "ETC") cannot prove its allegations without intruding upon, and making determinations about, the validity of the sovereign action of the Federal Republic of Nigeria in awarding a military contract to W.S. Kirkpatrick & Co., International (hereinafter referred to as "Kirkpatrick").[1]

First, the official sovereign act at issue in this case is the award of the military contract, not, as respondent contends, the demand for or payment of a bribe. It is the review of that contract award which properly raises act of state concerns.

Second, the United States suggests for the first time in its *Amicus* Brief (hereinafter referred to as "U.S. Br."), despite a contrary statement in its Brief on the Petition for Writ of Certiorari (hereinafter referred to as "U.S. Pet. Br."), that this act is within the commercial exception to the act of state doctrine similar to the commercial exception recognized in the Foreign Sovereign Immunity Act. *Compare* U.S. Pet. Br. at 18, n. 13 *with* U.S. Br. at 26-28. However, the commercial exception, to the extent it may exist, does not apply to the award of contracts entered for the protection of national defense.

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[1] Further, any rulings made by the Court are likely to be based upon incomplete information since it is doubtful that the Nigerian government will cooperate with any discovery proceedings. *See* Brief for Petitioners at 32, n.31 (hereinafter referred to as "Pet. Br.").

Third, principles of international comity dictate application of the doctrine in this case and should not be narrowly circumscribed to avoid application as the United States suggests. U.S. Br. at 19-28. Further, despite contentions by respondent and the United States that countervailing policy considerations mandate rejection of the doctrine in this case, Brief for Respondent (hereinafter referred to as "Resp. Br.") at 17-22; U.S. Br. at 33-37, the regulatory aims of the Foreign Corrupt Practices Act (hereinafter referred to as "FCPA") are not hindered by denying private causes of action.

ARGUMENT

I

THE AWARD OF THE NIGERIAN MILITARY CONTRACT TO KIRKPATRICK IS AN ACT OF STATE

The threshold question in an act of state analysis is whether an official act of a foreign sovereign is at issue in the litigation. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694-95 (1976); Restatement (3d) of the Foreign Relations Law of the United States § 443, comment i (1987) (hereinafter referred to as "Restatement (3d)"). Respondent and the United States attempt to avoid application of the act of state doctrine by contending that the act of state or the "primary conduct at issue" in this case is the bribery and not the contract award and that bribery is not an act of state. Resp. Br. at 23-32; U.S. Br. at 21-23. However, this case involves the exercise of sovereign authority by the Nigerian government — the award by the government of a military contract. Pet. Br. at 28-29. The act of state doctrine mandates that our courts not review the validity of that award. If respondent is prohibited from challenging that award then the contract was proper and respondent has no claim.

Referring to the government's act as the acceptance of a bribe, Resp. Br. at 23-32, respondent argues that no act of state was involved in this action because bribery is not an exercise of sovereign power. Resp. Br. at 30. Respondent attempts to support this position by noting that bribes to officials are improper internationally and in the United States under the FCPA. Resp. Br. at 27-32. However, the basis of the invocation of the act of state doctrine is not the payment of a bribe but rather the award of the contract. Although the basis upon which the sovereign act is challenged is the payment of a bribe, and the bribery allegation itself has foreign policy implications because of the need to expose illegal conduct by high level Nigerian officials, it is the propriety of the award of the contract which is at issue in the case. Pet. Br. at 11-13; *see also* Opinion of the United States District Court for the District of New Jersey. (A. 298) For ETC to prove its case, the court must determine that but for the

payment of a bribe, ETC would have been awarded the contract and that the contract was improperly awarded by the Federal Republic of Nigeria to petitioners.[2]

Proceeding with its faulty analysis that the sovereign act at issue is the bribery, respondent contends that the act of bribery is a private act and not public in nature, citing *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) and *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963). Resp. Br. at 23-27. In those cases, the courts found that the unlawful accumulation of wealth by a head of state was not protected by the act of state doctrine where the acts were private and not taken on behalf of the foreign sovereign. In *Marcos*, the Second Circuit found that defendant Marcos had not met his burden to prove that his accumulation of wealth was the result of an act of state. 806 F.2d at 359. The acts, in that case, appeared to be private acts of looting by a government official. *Id.* at 348. However, the court suggested that if Marcos' wealth was acquired through "official expropriation decrees or public monopolizing" then an act of state issue would be raised. *Id.* at 359-60. The Fifth Circuit in *Jiminez* also reasoned that the embezzlement acts taken by Jiminez, the then president of Venezuela, were not acts of state of the Venezuelan government because the acts were taken "for the financial private benefit of [Jiminez]." 311 F.2d at 557-58.

These cases have no application to the facts of this case. Here, it is not disputed that the Nigerian government, in its official capacity, awarded the military contract to Kirkpatrick.[3] Further, although made aware of the allegations by counsel for

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[2] Under RICO, the plaintiff must allege and prove that he has "been injured in his business or property *by reason of* [a RICO] violation." 18 U.S.C. §1964(c) (emphasis added). *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96 (1985) ("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation").

[3] The contract itself is between Kirkpatrick and the "Minister of Defense, Ministry of Defense, Lagos, for and on behalf of the Government of the Federal Republic of Nigeria." (A. 81)

respondent (A. 124-126), the Nigerian government did not institute any action or take steps to invalidate the contract which was still in progress at the time. (A. 143 and 173) Nor did Nigeria reply to respondent's request that the government indicate its approval of this lawsuit. (A. 143 and 173) In sum, the Nigerian government ratified the award by fully performing under the contract.[4]

The United States takes a position similar to respondent's, asserting that the "primary conduct at issue" in this case is the bribery.[5] U.S. Br. at 21-22. The United States concludes that, because there is no conflict between American and Nigerian law regarding bribery, principles of comity are not offended. U.S. Br. at 21-22. However, this case does not raise the issue of whether the payment of a bribe is legal or illegal but rather whether the contract issued to Kirkpatrick is valid or invalid. That contract award is a sovereign act which cannot be questioned but must be accepted as valid by our courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 418 (1964), *citing Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918).[6]

Further, the United States contends that ETC's claims implicate the allegedly "corrupt *personal* motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government, in awarding the contract." U.S. Br. at 39. (emphasis in original) However, ETC's claims cannot be adjudicated without implicating the Nigerian government's official award of the contract. It is impossible to

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[4] A foreign sovereign may later ratify its acts, thereby confirming that the act was a sovereign act. *See* Restatement (3d), Reporter's Note 3.

[5] However, the United States (as well as respondent) conveniently considers the 'act' to be the contract award for their respective discussions of the commercial exception. *See* Resp. Br. at 37-46; U.S. Br. at 26-28.

[6] Whether the act "comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government." Restatement (3d), comment c.

determine whether the Nigerian military contract properly belonged to respondent, a determination necessary to prove damages,[7] without determining that it was wrongfully awarded to Kirkpatrick. That is the very determination which the act of state prohibits and which, if it is to be reviewed, should be deferred to the Nigerian government.[8]

II

THE CONTRACT AWARD WAS A PUBLIC NOT A COMMERCIAL ACT

Respondent and the United States suggest that this Court should apply the commercial exception to the act of state doctrine as four justices did in *Alfred Dunhill of London, Inc. v. The Republic of China*, 425 U.S. 682, 706 (1976) (opinion of Justice White in which Rehnquist, Powell and Burger joined). *See* Resp. Br. at 37-46; U.S. Br. at 26-28. Petitioners, both courts below, and the Government in its petition brief but not in its *amicus* brief, have taken the position that the commercial exception, even if recognized, is not applicable to this case. Respondent, and the United States in its new position, assert that the 'act' was commercial and that this Court should adopt a broad commercial exception.

Petitioners suggest that the commercial nature of a foreign act should be only one of several factors considered rather than a mechanical test. There are fundamental differences between

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[7] *See infra* at p. 4, n.2.

[8] The Second Circuit makes this point in *Marcos*, 806 F.2d at 359-60, even though the property at issue in that action was in the United States whereas here the reasoning is more compelling because the contract was to be performed in Nigeria and was to be governed by Nigerian law. (A. 98) The American Bar Association ("ABA") in its *amicus* brief contends that the act of state doctrine is nothing more than a conflict of law rule. However, the ABA predicates its conclusion in this case that the act of state doctrine does not bar adjudication upon the faulty premise that the validity or legal effect of the contract is not at issue in this case. Brief *Amicus Curiae* of the American Bar Association at 20.

the doctrines of sovereign immunity and act of state which warrant different approaches. *See Dunhill*, 425 U.S. at 725-26 (Marshall, J., dissenting). Sovereign immunity exempts a foreign government from liability by virtue of its status, whereas the act of state doctrine precludes examination of the sovereign acts of a foreign government on the basis of comity and separation of power principles. *Id.* at 726, *citing Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Because the act of state doctrine is founded upon these latter concepts, a court should consider the underlying concerns regardless of the type of government activity involved. In the context of act of state concerns, a foreign government may engage in seemingly commercial activity which could trigger substantial foreign relations problems if adjudicated in American courts. For example, in *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the labor union brought an action to enjoin the OPEC nations from continuing to violate antitrust laws through OPEC's price-setting procedures. The activity of the OPEC nations at issue was arguably commercial – the development and sale of oil are activities done by profit-seeking private enterprises. However, the Ninth Circuit found the action barred by act of state concerns because of "sensitive petro-politics." *Id.* at 1361.

Even if this Court were to adopt the commercial exception as advocated by the four Justices in *Dunhill*, this case does not present the type of "purely commercial operations" discussed in *Dunhill*, 425 U.S. at 695-706. The nature of this military contract is laden with public, political and national security considerations as evidenced by the list of officials involved in the procurement process – the president, air force officials, party officials, ministry officials and defense department personnel. (A.217 and 221) Further, the contract provided that Kirkpatrick would provide highly technical equipment and services to the Minister of Defense for use by the Nigerian Air Force which undeniably involved considerations of national security.

Moreover, an examination of the cases where commercial transactions are described in the context of sovereign immunity

analysis, a comparison which both respondent and the United States advocate, demonstrates that this Nigerian military contract is dissimilar from those commercial transactions. *See, e.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989) (contract to provide kidney transplants between Greece and a Chicago hospital deemed commercial); *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) (sale of securities by Mexican bank is commercial); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (contract to supply cement to Nigeria was commercial); *Re Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981) (operation of a shipping company by foreign government deemed commercial). Unlike contracts with a foreign sovereign including with its military, to provide ordinary commercial goods, such as cement or boots or rice, this contract provided for furnishing of technical equipment to the Nigerian military as well as services, including training of Nigerian Air Force personnel. *See* Contract. (A. 81-117) As the United States observed about this contract in its petition brief, "the decision to award a military procurement contract, a decision that is often 'influenced by national security considerations' is a sufficiently 'official' expression of a state's 'public' interest to warrant application of the act of state doctrine." U.S. Pet. Br. at 18, n.13.

Moreover, even under the Foreign Sovereign Immunity Act, it is doubtful that this contract would be deemed to be "commercial activity."[9] Commercial activity is determined by reference to

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[9] The United States asserts that this contract would be regarded as "commercial activity" for purposes of the Foreign Sovereign Immunity Act, noting a statement in the legislative history which says that a contract to buy provisions for its armed forces would constitute a commercial activity. U.S. Br. at 27-28. However, the legislative history never suggests that all contracts with the military are commercial. It is the nature of the goods or services being provided which determines whether the transaction is deemed commercial. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong.

(*Footnote continued*)

the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. 28 U.S.C. § 1603(d). In looking at its nature, if the transaction is one ordinarily performed by private enterprise, or for profit, then it will be deemed commercial. *See* H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604; *see generally* Note, *The Foreign Sovereign Immunities Act: Defining Commercial Activity and Direct Effect Jurisdiction*, 25 Santa Clara L. Rev. 105, 108-14 (1985).

There is no doubt that "the essence or central elements of the agreement" made by the Nigerian government could not have been made by a private person. *See Millen Ind., Inc. v. Coordination Council For North American Affairs*, 855 F.2d 879, 884 (D.C. Cir. 1988); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("inquiry ordinarily focuses on whether the acts are those private persons ordinarily perform"). This contract involved highly technical equipment and training services for use by the Nigerian Air Force, and is not the type of contract into which private persons enter. The Nigerian government awarded this contract to obtain specific training equipment and skills for military personnel to further national security interests rather than to pursue a profit. Nigeria has the sole power to control and train its armed forces, and such training is a uniquely public or governmental activity. *See Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (contract between Saudi Arabia and United States to train Saudi's armed forces found governmental, not commercial, because the government "has sole control [over] its armed forces and proper training of those forces is an essential ingredient of that control").

& Admin. News 6604, 6614-15. The nature of this contract, to provide highly-technical equipment and training involving national security considerations is unlike a contract with which the armed forces would buy uniforms or shovels.

III

THIS LITIGATION OFFENDS NOTIONS OF COMITY AND DOES NOT ADVANCE AMERICAN POLICY OR ECONOMIC INTERESTS

Principles of international comity, which underlie the act of state doctrine, prohibit the kind of inquiry into Nigerian affairs required by this litigation.[10] Although the United States recognizes that issues of comity apply to this case, it contends that countervailing American policy interests in the enforcement of our own laws should prevail over the deference which might otherwise be accorded to a foreign sovereign under principles of comity. U.S. Br. at 19-21. The United States also unduly narrows the scope of comity under the doctrine as well as the scope of the factual findings required for respondent to prevail in this matter. Thus, the United States reaches the erroneous conclusion that comity does not require application of the doctrine to this case.

First, respondent and the United States argue that the regulatory considerations set forth in the FCPA override act of state concerns in this case. Resp. Br at 27-32; U.S. Br. at 33-37. However, the FCPA has been enforced in this case by the United States and the statute does not provide for private remedies. *See* Pet. Br. at 23-26. Recognizing that no private right of action exists under the FCPA,[11] the United States contends that its interest in enforcing the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et. seq.*, creates a policy of overriding concern here.[12] U.S. Br. at 36-37 and 20-21. However, RICO is a catch-all provision like conspiracy which,

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[10] *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 780-796 (1972) (Brennan, J., dissenting) (discussion, *inter alia*, of the political question doctrine and principles of comity as part of the act of state analysis). U.S. Br. at 35-36.

[11] U.S. Br. at 35-36.

[12] Nothing in either the FCPA or RICO indicates any congressional intent to override the act of state doctrine in enforcement of these statutes.

outside of its originally intended purpose to stop organized crime, has no ... aggressionally expressed policy relevant to this action. Therefore its use in this action can only be said to enforce the policy behind the FCPA which the Government concedes was not intended to be enforced by private parties. U.S. Br. at 35-36. Thus, no particular regulatory need is filled by refusing application of the act of state doctrine to this case. Once it is recognized that no countervailing policy considerations exist which would require the courts to limit the application of comity to this case or to circumscribe evidentiary matters in an effort to permit adjudication, the Government's arguments for those restrictions lose considerable force.

By contending that no challenge is made to the contract award, both respondent and the United States manage to avoid the most difficult act of state issue in this case. Respondent emphasizes that "this case does not address the validity *vel non* of the Kirkpatrick-Nigeria contract," Resp. Br. at 24, n.16, and that the validity of no governmental action is in question because the litigation does not seek to rescind the commercial contract nor to obtain compensation from Nigeria itself. Resp. Br. at 33, n.25. The United States, noting that the action was not brought against the Nigerian government, contends that "the courts below would not be required to adjudicate the validity of an act of the Nigerian Government." U.S. Br. at 23. The Government then concludes that "the contract will retain whatever effect it otherwise has as a matter of *Nigerian law*, and that effect presumably will continue to be recognized in the United States." U.S. Br. at 25. (emphasis in original) However, it is impossible to reconcile the dual contentions of the Government that the Nigerian contract will be recognized in the United States and that a United States court should be permitted to find that the contract was improperly awarded to Kirkpatrick and should have been awarded to respondent. Whether or not the Nigerian government is a party, the lawful effect of the contract is plainly *the* issue in the case.[13]

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[13] If the position of the United States and respondent hinges upon the dual facts that the Nigerian government is not a party to the suit and that the

(*Footnote continued*)

To support its view that the act of state doctrine is inapplicable here, the United States argues for a limited scope of comity as it relates to the act of state doctrine. At the same time, however, it raises the specter of concern for "other aspects of international comity" stating that it expresses "no view on whether other aspects of international comity that are distinct from those informing the act of state doctrine - *e.g.* principles of comity concerning the production of evidence in Nigeria or pertaining to the affairs of its Government - may properly be invoked in further proceedings in this case." U.S. Br. at 25, n.25. While some commentators have urged that principles of comity make the act of state doctrine superfluous,[14] the two should at least be recognized as co-extensive.[15] Whether or not evidence relating to the affairs of the Nigerian government can or should be gathered and judged in this case is a problem properly addressed by the act of state doctrine and should not be left for another day.

At the same time that the United States urges that evidentiary problems, although raising issues of comity, are beyond act of state concerns, the United States suggests an unworkable standard of proof which is presumably intended to avoid any intrusion upon Nigeria's internal decision-making processes. The government asserts that the issue of causation can be determined by "identifying the intended and foreseeable consequences" of Kirkpatrick's conduct and thus "would be addressed only to determine the domestic consequences of petitioners' conduct." U.S. Br. at 23-24. However, respondent's damage claim cannot be predicated upon such proof but must be based upon proof of actual injury which in this case would be proof that

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contract is "recognized" in the United States, a party would presumably be precluded from obtaining injunctive relief sought at the commencement of the contract.

[14] *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa.L.Rev. 325, 389-92 (1986) (arguing that principles of comity are covered within the political question doctrine).

[15] The dichotomy has been invoked by some courts to avoid potentially difficult decisions. *See, e.g., Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979) and *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300, 305 (3d Cir. 1982).

respondent would have been awarded the contract but for Kirkpatrick's conduct. Thus the issue cannot be limited to "domestic consequences" but necessarily involves detailed inquiry into the Nigerian government's procurement award processes and speculation of the chain of events in this case absent the bribery.[16] And, while there may be international consensus regarding bribery, there is no such consensus about how, much less whether it is proper, to review the decision-making processes of a sovereign. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). It would be wiser to abstain from adjudicating this case based upon principles of comity underlying the act of state doctrine than to call upon American courts to change substantive law — in the form of evidence required to prove damages — to avoid intrusion upon the decisions of a foreign nation as the Government's position would require. U.S. Br. at 23.

Finally, the effect of this case upon international commerce should not be ignored. *See* Brief of the Republic of China as *Amicus Curiae* for Petitioner. Both American businessmen and the foreign governments with whom they contract rely on the validity of their contracts.[17] If this Court allows American courts to scrutinize these sovereign decisions, contracting with American companies will pose the added risk to a foreign government that American courts will become the arbiters of the foreign sovereign's internal political affairs.[18] In addition to the litigation which may arise from every disappointed bidder, if this court opens the door for American courts to examine the motivations and policy judgments of foreign sovereigns, any change in a foreign nation's administration or government may provide a basis for a sovereign to challenge the official acts of the preceding regime in American courts.

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[16] The United States never directly addresses the proof required for respondent to prove damages in this case.

[17] *See* Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. __ (1989) (to be published in November) (noting in support of the act of state doctrine that parties rely on the finality of the acts of foreign states).

[18] As respondent notes, no other country has legislation analogous to the FCPA. Resp. Br. at 30, n.19.

CONCLUSION

For all of the above reasons, and for the arguments set forth in Petitioners' Brief, this Court should find respondent's claims barred by the act of state doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

W.S. KIRKPATRICK & CO., INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the act of state doctrine should be applied to bar a private civil action brought under United States law by a United States corporation that was the disappointed bidder for a military construction contract awarded by the Government of Nigeria, seeking to recover damages from another United States corporation that allegedly obtained the contract as a result of paying bribes to Nigerian officials.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The act of state doctrine is based on principles of comity among nations and the proper distribution of functions between the judicial and political Branches in the area of foreign affairs. As the "constitutional representative of the United States with regard to foreign nations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the Executive Branch has a vital interest in proper application of the doctrine. The United States also enforces the federal laws under which respondent's suit arises, as well as the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-1 and 78dd-2, which prohibits bribery of foreign officials.

STATEMENT

1. In 1980, petitioner Carpenter, the Chairman and Chief Executive Officer of petitioner W.S. Kirkpatrick & Co., a New Jersey corporation, learned that the Nigerian Government planned to construct an aeromedical

center for its Air Force.[1] Carpenter hired a Nigerian national, petitioner Akindele, to act as Kirkpatrick's local agent in procuring the contract. Akindele informed Carpenter that Kirkpatrick should be prepared to pay a "sales commission," totalling 20% of the contract price, to Nigerian political and military officials. Kirkpatrick and Akindele agreed that, if Kirkpatrick received the contract, it would pay the "commission" through two Panamanian corporations established by Akindele. Respondent, a Pennsylvania corporation, also bid for the contract.

In March 1982, the contract was awarded to a subsidiary of Kirkpatrick. The Nigerian Government made four payments to Kirkpatrick under the contract in 1982 and 1983. On each occasion, Kirkpatrick, through use of the mails or wires, paid a portion of the promised "commission" to Akindele's Panamanian corporations, which distributed them to the intended recipients. Kirkpatrick paid more than $1.7 million under this arrangement. After learning that its bid had been far lower than Kirkpatrick's, respondent reported its findings to the Nigerian Air Force and the United States Embassy in Lagos. Carpenter and Kirkpatrick subsequently pleaded guilty to one count of violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-2, based on one of the four payments.[2] In connection with their pleas, Carpenter and Kirkpatrick stipulated to an offer of proof that outlined the agreement between Carpenter and Akindele and the payments made to the Panamanian corporations, but did not state that money had actually been paid to Nigerian officials (J.A. 17-20, 35-38). Pet. App. A4-A7, A43-A44.

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[1] The statement of facts is taken from the opinions below, which are based on allegations in the complaint. Pet. App. A4 n.1.

[2] The count charged Carpenter and Kirkpatrick with using an international telex in furtherance of the payment, while having reason to know that a portion of the money would be offered, promised or given to governmental and party officials in Nigeria for the purpose of inducing them to use their influence to obtain the contract for Kirkpatrick. J.A. 15-16, 33-34.

2. Respondent then brought this suit seeking to recover damages from Kirkpatrick and the other petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968; Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c); the New Jersey Anti-Racketeering Act, N.J. Stat. Ann. §§ 41-1 to 41-6.2 (West 1982); and the common law of interference with prospective contractual relations. Petitioners moved to dismiss the complaint on the ground that the suit is barred by the act of state doctrine. In response to the court's request for the views of the Department of State, the Legal Adviser stated in a letter that the United States had taken the position in its amicus briefs at the petition stage in *Mitsui & Co.* v. *Industrial Development Corp.*, 445 U.S. 903 (1980), and *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977), that inquiries into the motivation (as distinguished from the validity) of the official acts of a foreign sovereign are not barred by the act of state doctrine (Pet. App. A34-A37). Adhering to that view, and based upon his understanding that "the validity of the Nigerian Government's decision to award the contract * * * is not in question," the Legal Adviser stated that the act of state doctrine would not bar the court "from adjudicating this dispute." He cautioned, however, that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations," and he urged the court "to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." *Ibid.*[3]

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[3] Counsel for respondent requested a declaration from the Nigerian Embassy in Washington that the prosecution of this action "will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America" (Pet. App. A45; J.A. 124-132). The Nigerian Government did not respond to that letter; nor, apparently, has it repudiated the contract or taken any other action in response to the allegations (Pet. App. A45, A62 n.14; see J.A. 143-144, 173, 175).

After receiving the Legal Adviser's letter, the court dismissed the suit (Pet. App. A38-A73), holding it barred by the act of state doctrine (*id.* A53-A66). The court noted that in order to prevail, respondent must demonstrate that petitioners "intended to wrongfully influence the award of the Nigerian contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, respondent would have been awarded the Nigerian contract" (*Id.* at A55-A56). Because "the indispensible ingredient of [respondent's] cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law," the court believed the suit would "question[]," either "directly or collaterally," the acts of a foreign sovereign (*id.* at A57-A58). The court believed such an inquiry might embarrass the political Branches, or make relations with Nigeria more difficult, by impugning the integrity of decisions of Nigerian officials (*id.* at A55, A56, A58, A64-A65).

The district court rejected respondent's contention that the FCPA prosecutions of Carpenter and Kirkpatrick created an exception to the act of state doctrine, noting that the offer of proof in the FCPA case did not establish that bribes had actually been paid to Nigerian officials (Pet. App. A61-A62). The court likewise concluded that the Legal Adviser's letter did not bring this case within the "*Bernstein* exception" to the act of state doctrine,[4] which has been invoked where the Executive Branch represents that application of the doctrine would not advance the interests of United States foreign policy (*id.* at A62-A65). The court reasoned that, although the Legal Adviser took the position that the doctrine is in-

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[4] See *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

applicable in this case, he acknowledged that "inquiries into the motivation and validity of actions by foreign states * * * may seriously affect United States foreign relations" (*id.* at A63).

3. The court of appeals reversed (Pet. App. A1-A37). It recognized that the award of a military procurement contract can be a sufficiently formal expression of sovereign interests to trigger the act of state doctrine and does not fall within any exception for ministerial or "commercial" acts, because it may involve national security considerations that "are far from routine" (*id.* at A12-A13). But the court nevertheless found the act of state doctrine inapplicable (*id.* at A13-A21). It noted that respondent did not seek to have the contract invalidated or to recover damages from the Nigerian Government or its officials, and "the district court would be called upon simply to determine as a factual matter whether [Kirkpatrick's] alleged bribery of Nigerian officials motivated the award of the contract" (*id.* at A17-A18). The court therefore concluded that "the district court's dismissal was based on little more than speculation about the effect that [respondent's] lawsuit might have on relations between the United States and Nigeria" (*id.* at A17).

The court also declined to follow *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), which held that judicial inquiry into whether bribery caused a foreign sovereign act was barred because it would "impugn or question the nobility of a foreign nation's motivation" (Pet. App. A15). The court below believed that the doctrine should not be applied "to allow litigants to shield themselves from the consequences of illegal conduct abroad" and should not "in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government" (*id.* at A15-A16). The court found support for this view in the Legal Adviser's letter, observing that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will

not be compromised by orderly federal court adjudication of [respondent's] lawsuit" (*id.* at A19).[5]

SUMMARY OF ARGUMENT

I. Under the classic formulation of the act of state doctrine, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Redress for such acts ordinarily is available only in the courts of the other nation or through diplomatic means. As synthesized in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the doctrine has evolved from a rather rigid rule based on territorial sovereignty to a more flexible analysis based on international comity and the responsibility of the political Branches for the conduct of foreign relations.

In *Sabbatino* itself, the Court, consistent with the position of the Executive Branch, held that United States courts could not examine the validity of a Cuban expropriation decree under either Cuban or international law, because there was no governing treaty or unambiguous agreement on the controlling principles of international law and judicial inquiry might interfere with the Executive's conduct of foreign relations. But in two subsequent decisions, the Court, again in accordance with the Executive Branch's position, held that the act of state doctrine should not be applied where adjudication of the claims was consistent with equity, the underlying purposes of the doctrine, and the foreign relations interests of the United States. *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S.

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[5] The court read the Legal Adviser's suggestion that the district court exercise "caution and due regard for foreign sensibilities" as a "reminder" that "[f]oreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules" and that courts should "exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities" (Pet. App. A19-A20 n.11); see App., *infra*, 2a.

759 (1972); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976).

II. A. Adjudication of respondent's claims would be consistent with principles of international comity that inform the act of state doctrine. In *Sabbatino* and other cases, the act of the foreign state itself was challenged under the law of that state or international law. Respondent's suit, by contrast, is brought against private parties and arises under provisions of United States law (RICO, the Robinson-Patman Act, and New Jersey law) that, in respondent's view, were directly applicable to petitioners' primary conduct. The interest of the United States in enforcing its laws weighs heavily in the comity analysis. Nor is there any conflict with Nigerian law on this point, because Nigeria, like virtually all countries, makes bribery of its public officials illegal. Moreover, because respondent has not sued Nigeria and does not allege violations of Nigerian law, the court will not be required to adjudicate the validity or enforceability of the contract under Nigerian law. Finally, although Nigeria's decision to award the contract to Kirkpatrick rather than respondent does not fall within any "commercial activity" exception to the act of state doctrine, it nevertheless is relevant that petitioners' alleged acts of bribery were designed to induce Nigerian officials to enter into a commercial relationship.

B. The constitutional underpinnings of the act of state doctrine confirm that dismissal of respondent's complaint is not required. Even private litigation challenging the sovereign act of a foreign state affects the foreign relations interests of the United States, the other country involved, and the community of nations—matters for which the President and Congress are responsible under the Constitution. A court therefore must give great weight to the views of the Executive Branch (and relevant acts of Congress) on whether a failure to give full effect to the sovereign act of a foreign state would be consistent with our foreign relations interests. Here, the act of state concerns arise because, in order to

prove that it was injured by reason of petitioners' alleged violation of United States law, respondent must show that Nigeria's award of the contract was caused by the alleged bribes. However, we have been advised by the Department of State that, in its judgment, adjudication of this case would not be inconsistent with the conduct of the Nation's foreign relations. We also have been advised that, in the absence of an affirmative representation to the contrary, adjudication of other private suits solely involving commercial bribery of foreign officials by United States firms would not embarrass the conduct of foreign relations. These assessments by the Department of State are consistent with the Foreign Corrupt Practices Act, in which Congress has made it a criminal offense for United States nationals to bribe foreign officials to obtain business.

C. The Court should not adopt a general rule that would attach dispositive significance to whether a suit involves only the "motivation" for, not the "validity" of, a foreign sovereign act. Some cases that concern only a foreign government's motivation plainly do raise significant act of state concerns. In this case, however, respondent's claims implicate only the allegedly corrupt personal motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government itself in awarding the contract.

ARGUMENT

THE ACT OF STATE DOCTRINE SHOULD NOT BE APPLIED TO BAR ADJUDICATION OF RESPONDENT'S DAMAGE CLAIMS UNDER UNITED STATES LAW BASED ON PETITIONERS' ALLEGED BRIBERY OF NIGERIAN OFFICIALS TO OBTAIN A CONTRACT

The opinion in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), sets forth the Court's understanding of the origins, bases, and proper application of the act of state doctrine. The Court in *Sabbatino* identified the underpinnings of the doctrine in principles of comity among nations and the primary responsibility of the

political Branches—and especially the Executive Branch —in the area of foreign relations.

Although the Court's prior decisions had appeared to take a rather rigid view of the act of state doctrine, *Sabbatino* expressly declined to lay down or reaffirm any inflexible or all-encompassing rule for application of the doctrine in future cases. Consistent with *Sabbatino*, and in recognition of the widely divergent circumstances in which the issue may arise, we do not urge any rigid formula for the resolution of act of state cases generally. In particular, we do not urge the Court to choose among the expressions in judicial opinions and commentary that have variously sought to explain the act of state doctrine as a rule of judicial abstention,[6] an aspect of the political question doctrine,[7] a choice-of-law rule,[8] a broader conflict-of-laws rule that incorporates both choice-of-forum and choice-of-law notions,[9] or a principle of repose that treats the act of a foreign sovereign as conclusively settling its legality in the courts of the United States, much as the judgment of a court operates under principles of issue or claim preclusion.[10] Each of these analytical theories may furnish useful in-

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[6] *First National City Bank*, 406 U.S. at 773-776 (Powell, J., concurring); *Alfred Dunhill*, 425 U.S. at 715 (Powell, J., concurring).

[7] *First National City Bank*, 406 U.S. at 787-790 (Brennan, J., dissenting); *Alfred Dunhill*, 425 U.S. at 727-728 (Marshall, J., dissenting).

[8] *Alfred Dunhill*, 425 U.S. at 705-706 n.18 (opinion of White, J.); *id.* at 726 (Marshall, J., dissenting); Henkin, *Act of State Today: Recollections in Tranquility*, 6 Column. J. Transnt'l L. 175, 178 (1967).

[9] Restatement (Third) of the Foreign Relations Law of the United States § 443, reporters' note 1 (1987); Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 Va. J. Int'l L. 685, 709-718 (1976); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918).

[10] J. Dellapenna, *Deciphering the Act of State Doctrine*, Manuscript at 44-52 (1989) (to be published in 35 Vill. L. Rev.); *Ricaud*, 246 U.S. at 309; *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1113-1114 (5th Cir. 1985). Cf. *Hilton* v. *Guyot*, 159 U.S. 113 (1895).

sights in one setting or another. But at least for the case at hand, we believe that whatever guidance they impart is sufficiently subsumed in the more general understanding, synthesized in *Sabbatino*, that the doctrine "effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government." *First National City Bank*, 406 U.S. at 762 (opinion of Rehnquist, J.). We therefore rest our submission on the identification of a number of factors that, under principles of comity and separation of powers, indicate that application of the act of state doctrine is not required in the circumstances of this case. Before turning to those considerations, however, we believe it appropriate to review the manner in which the act of state doctrine has evolved through this Court's decisions.

I. *SABBATINO*, ITS PREDECESSORS, AND ITS PROGENY

The act of state doctrine has gradually been transformed from a set of precepts based on strict notions of territorial sovereignty, requiring seemingly unquestioned deference by our courts to the acts of a foreign government within its territory, to a more flexible analysis in which the national interests of the United States may in certain circumstances require modification of the effect to be given to the act of a foreign state. In addition, because the decision whether to disregard a foreign act of state in United States courts often implicates important and sensitive foreign relations interests of the United States, and because the ascertainment, articulation and implementation of those interests is the responsibility of the political Branches, the Court has recognized in *Sabbatino* and other cases that the doctrine must respect the role of those Branches under established principles of separation of powers.

1.a. Although the origins of the act of state doctrine may be found in the earliest years of the Nation's jurisprudence,[11] the Court's seminal decision on the sub-

[11] The principle that courts of one nation will not sit in judgment on the acts of another was articulated (though not fully de-

ject is *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In *Underhill*, an American citizen brought suit in an American court against the commander of revolutionary forces who exercised full civil and military authority over a city in Venezuela, seeking damages (presumably under Venezuelan law) for illegal detention and related wrongs. The trial court directed a verdict for the commander, and this Court affirmed. 168 U.S. at 252-253. The Court explained its holding in what *Sabbatino* later described, 376 U.S. at 416, as the "classic American statement" of the act of state doctrine (168 U.S. at 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[12]

See also *Hatch* v. *Baez*, 7 *Hun.* 596 (N.Y. Sup. Ct. 1876).

b. In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), the defendant was not, as in *Underhill*, the foreign official who committed the act of state, but rather an American company that allegedly induced the act. The Court nevertheless concluded that the *Underhill* principle applied. *American Banana* was a

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veloped) in early decisions of this Court. See *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253 (1816); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822). The doctrine is generally traced to *Blad* v. *Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674), in which the English courts declined to question a patent granted by the King of Denmark. See *Sabbatino*, 376 U.S. at 416; see also *Duke of Brunswick* v. *King of Hanover*, [1848] 2 H.L.C. 1.

[12] The Court also noted that the commander acted to coerce the American plaintiff to operate the city water works for the benefit of the community and the revolutionary forces, not out of "malice or any personal or private motive." 168 U.S. at 254.

suit between two American companies under the antitrust laws of the United States, in which the plaintiff alleged that the defendant had caused the Government of Costa Rica to seize the plaintiff's banana plantation and railroad for the purpose of eliminating it as a competitor. In an opinion by Justice Holmes, this Court affirmed the dismissal of the complaint. The Court first held that the antitrust laws did not reach conduct occurring outside of the United States (213 U.S. at 357), a holding that has, of course, been rejected by subsequent decisions. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962).

More pertinently, the Court also relied upon act of state principles (213 U.S. at 357-359):

> [T]he acts of the defendant in * * * Costa Rica * * * were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of [the Sherman Act]. * * *
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> The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.
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> * * * As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. * * * A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Thus, in *American Banana*, the Court concluded that the defendant's conduct should not give rise to liability un-

der United States law (even assuming the antitrust laws otherwise applied in Costa Rica) because the plaintiff's injury was the direct effect of acts of the Costa Rican Government. Moreover, the defendant's conduct, including its inducement of the expropriation, appeared to be lawful under the law of Costa Rica.

c. The Court reiterated the rule of *Underhill* and *American Banana* in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918)), and *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Those cases involved disputed title to property that was seized in Mexico by revolutionary forces that later were recognized by the Executive Branch as the government of Mexico. Relying on principles of separation of powers and comity, the Court gave effect to the seizures by sustaining the title of the party who claimed through a person who purchased from the Mexican Government after the seizure, rather than from the prior owner.

The Court first stressed that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government," and held that the courts could not question the Executive's recognition of the revolutionary forces that expropriated the property. *Oetjen*, 246 U.S. at 302-303. The Court then explained that the governing principle of *Underhill* and *American Banana*, which involved damage claims based upon torts allegedly committed in the foreign country, was equally applicable to a case involving title to property brought within the custody of the court. This was so, the Court reasoned, because the principle "rests at last upon the highest considerations of international comity and expediency," and "[t]o permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Oetjen*, 246 U.S. at 303-304.

At the same time, the Court rejected the contention that the rule of *Underhill* and *American Banana* deprives

a court of jurisdiction over a case involving the act of a foreign sovereign. Rather, the Court explained, it requires only that "when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision" (*Ricaud*, 246 U.S. at 309). Any remedy the losing claimant might have, the Court concluded, must be in the courts of Mexico or through diplomatic efforts of the Executive Branch. *Id.* at 310; *Oetjen*, 246 U.S. at 304.

2. It was against the background of these precedents that the Court reexamined the act of state doctrine in *Sabbatino*. See 376 U.S. at 416-418.[13] *Sabbatino* involved an expropriation by the Cuban Government of the property and rights of an American-owned Cuban corporation. The expropriation was challenged in United States courts on the ground that it violated Cuban and international law. The Court held that the expropriation must be given effect by United States courts and that the Cuban government, not the former American owners, was entitled to the proceeds of the sale of expropriated sugar.

In reciting the evolution of the doctrine (376 U.S. at 416-419) and finding it to be one of federal law (*id.* at 421-427), the Court examined the various justifications that had been offered for it. The Court rejected the view, implied by *Underhill*, *Oetjen*, and *American*

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[13] *Sabbatino* also cited *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942). 376 U.S. at 416-417. In those cases, the Court gave effect to the expropriation by the Soviet Union of all assets of Russian companies, including assets in the United States. Although the act of state doctrine ordinarily is limited to acts of a foreign sovereign that are effectuated within its own territory, the President had concluded an executive agreement with the Soviet Union, which included an assignment to the United States Government of the Soviet Union's claims against expropriated assets in the United States. For this reason, and because American claimants were not adversely affected, the Court found it to be consistent with the public policy of the United States to give effect to the Soviet decree even as it applied to such assets. *Pink*, 315 U.S. at 226-234.

Banana, that the act of state doctrine is compelled by the inherent nature of a foreign sovereign's authority within its territory. The Court noted that if a transaction takes place in one jurisdiction and the forum is in another, the forum state does not divest the other state of its territorial sovereignty if it applies its own law to the controversy or dismisses the suit. The Court likewise rejected the view that the doctrine is required by international law (as evidenced by the practice of nations), since most countries in fact failed to adhere to it rigidly. Finally, the Court held that, although the conduct of the Nation's foreign relations is committed by the Constitution to the Executive and Legislative Branches, the Constitution does not thereby render every case touching upon foreign relations a political question or irrevocably remove from the Judiciary the capacity to review the validity of foreign acts. See generally 376 U.S. at 421-423.

After putting these alternative rationales to one side, the Court reiterated that the doctrine rests in part on the principles of comity among nations articulated in *Underhill*, *Oetjen* and *Ricaud*. 376 U.S. at 416-418; cf. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136-137, 146-147. It further held that, although the doctrine is not constitutionally compelled, it does have " 'constitutional' underpinnings." 376 U.S. at 423. Thus, in the Court's view, the doctrine arises out of the basic relationships among the Branches under the separation of powers and "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Ibid.* Specifically, it "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Ibid.*

Applying these principles, the Court held that United States courts could not inquire into the validity of the

Cuban expropriation decree. It noted that judicial inquiry into the validity of a foreign official's actions under the law of his own state "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." 376 U.S. at 415 n.17, citing *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808). In holding that the courts likewise could not examine the validity of the expropriation under international law, the Court declined to "lay[] down or reaffirm[] an inflexible and all-encompassing rule," because the continuing vitality of the doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-428.[14] The Court therefore held that the courts "will not examine the validity of a taking of property within its own territory by a foreign sovereign government * * * in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Ibid.*

The Court found these principles barred adjudication of the claim in *Sabbatino*. Although the Department of State had taken the firm view in the diplomatic arena that the expropriation violated international law (376 U.S. at 432), the Court found no consensus among nations on that question (*id.* at 428-430) and therefore found that it was "not meet for adjudication by domestic tribunals" (*id.* at 429 n.26). The Court also feared that judicial determinations in a few individual cases regarding the validity of an expropriation under international

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[14] For example, the Court noted that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it would be for a court to render decisions regarding it. The Court also found it evident that "some aspects of international law touch much more sharply on national nerves than do others," and that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428.

law could interfere with or embarrass the Executive Branch in its efforts to obtain compensation for *all* United States citizens through economic and political sanctions and diplomatic efforts, yet at the same time would prove ineffective to exert real pressure on the Cuban Government. *Id.* at 430-437.

3. Since *Sabbatino* was decided, the Court has held in two other cases that adjudication of the validity of a foreign act was not barred by the act of state doctrine in the particular circumstances presented. In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court held that a United States court could adjudicate the validity of a Cuban expropriation decree in the context of a counterclaim arising in a suit brought by an instrumentality of the Cuban Government. The Solicitor General in that case filed with the Court a letter from the Legal Adviser of the Department of State, stating that the foreign policy interests of the United States do not require application of the doctrine to bar adjudication of a counterclaim or setoff when the foreign state's claim arises from a relationship existing at the time of the expropriation and the amount of relief sought is limited to the amount of the foreign state's claim. See *id.* at 781 (Brennan, J., dissenting). Three Justices, explicitly adopting the so-called "*Bernstein* exception," [15] took the position that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts" (*id.* at 768) (opinion of Rehnquist, J.)). Those Justices further noted (*id.* at 768-769), as did Justice Douglas in his separate opinion (*id.* at 770-773), that allowing the counterclaim also was consistent with the principles of equity set forth in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), which held that sovereign immunity did not bar assertion of a counterclaim against a foreign

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[15] See note 4, *supra*, and page 32 and note 32, *infra*.

sovereign that invoked the jurisdiction of our courts.[16]

In *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976), the Court held that Cuba's refusal to pay a commercial debt did not constitute an act of state in the absence of some statute, decree or order of the Cuban Government indicating that it had repudiated the debt or confiscated the amounts due. *Id.* at 690-695. In a plurality opinion for four Members of the Court, Justice White further concluded that the act of state doctrine should not in any event be extended to the repudiation of a commercial debt. *Id.* at 695-706. The plurality placed particular reliance on the Executive Branch's statement, which indicated that purely commercial conduct, as opposed to public or governmental acts, should not be regarded as the sort of conduct to which the doctrine applies. That position made clear that no embarrassing conflicts with the Executive Branch would ensue from adjudicating the validity of the repudiation. *Id.* at 696-698.

As these two cases demonstrate, the Executive Branch has moved incrementally in suggesting areas in which the act of state doctrine need not be applied in order to protect the foreign policy interests of the United States. And the Court likewise has moved incrementally in adjusting the application of this once-rigid doctrine in light of the flexibility suggested by *Sabbatino*, in order to accommodate changing developments in the international community (*Alfred Dunhill*) or equitable factors (*First National City Bank*). Indeed, the *result* reached in each of the Court's most recent cases—*Sabbatino*, *First National City Bank*, and *Alfred Dunhill*—was that urged by the Executive Branch, despite some divergence

[16] In a separate opinion that expressly departed from the reasoning of *Sabbatino*, Justice Powell concurred in the judgment because it did not appear that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political Branches (406 U.S. at 773-776). The four dissenting Justices concluded that the act of state doctrine was applicable to the counterclaims. Like Justice Powell (*id.* at 773) and Justice Douglas (*id.* at 772-773), they did not believe that a "*Bernstein* exception" should be recognized (*id.* at 776-777, 782-793 (Brennan, J., dissenting)).

in the supporting rationale. As we explain below, our submission in this case builds upon the approach both we and the Court have taken in *Sabbatino* and subsequent cases, but finds support in principles articulated in the Court's earlier cases as well.

II. PRINCIPLES OF SEPARATION OF POWERS AND INTERNATIONAL COMITY SUGGEST THAT APPLICATION OF THE ACT OF STATE DOCTRINE IS NOT REQUIRED IN THIS CASE

Both the Court's general articulation of the bases for the act of state doctrine in principles of separation of powers and comity, and the Court's application of those principles in *Sabbatino* and other cases, suggest that respondent's claims in this case need not be barred. As we explain in Part A, several considerations of international comity suggest that the act of state doctrine need not be applied in this case. These same considerations also have informed the determination by the Department of State that the conduct of the foreign relations of the United States would not be adversely affected by adjudication of respondent's claims. As we explain in Part B, that judgment regarding the foreign relations context of the case—and of the requirements of international comity in this setting—is entitled to great weight.

A. International Comity

"'"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'" *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 543-544 n.27 (1987) (quoting *Hilton* v. *Guyot*, 159 U.S. at 163-164). As *Societe Nationale* and *Hilton* v. *Guyot* show, the courts are called upon in a variety of circumstances to determine the relationship between the laws and official acts of the

United States and those of foreign countries—often in suits between private parties that do not implicate substantial exercises of sovereign authority by another nation.

In the context of the act of state doctrine, however, the national sensibilities that principles of comity seek to accommodate may be present with particular intensity and significance. This is because the doctrine typically applies to discrete acts of a foreign government that represent a deliberate and focused exercise of sovereign authority, often in relation to particular property, transactions, or persons. It therefore is with good reason that the courts have historically given effect to the sovereign acts of other nations, and that, under *Sabbatino*, they properly look to the views of the coordinate Branches and their place in the Constitutional structure in deciding whether to adhere to or depart from that practice. Here, we believe that considerations of comity do not require that respondent be precluded from litigating its claims.

1. In *Sabbatino* and many of the Court's other act of state cases, the act of a foreign sovereign itself was challenged on the ground that it was illegal under that nation's law or international law. There was no suggestion that the primary conduct at issue was directly governed by United States law. This case is, obviously, different. Respondent's suit is brought against private parties who are United States nationals, not against the Government of Nigeria or its officials, and the suit arises under laws of the United States that, in respondent's view, directly applied to petitioners' primary conduct.

In particular, respondent seeks to recover treble damages under RICO for injuries sustained in its business or property as a result of petitioners' alleged racketeering activities. 18 U.S.C. 1964(c). RICO, and the mail and wire fraud statutes that it incorporates,[17] make manifest that the United States has (and has asserted) a strong

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[17] See 18 U.S.C. 1961(1), defining the term "racketeering activity" to include any act that is indictable under 18 U.S.C. 1341 (relating to mail fraud) or 1343 (relating to wire fraud).

interest in protecting the channels and instrumentalities of the interstate and foreign commerce of the United States against uses intended to perpetrate fraud and corruption. Just as RICO prohibits racketeering activities designed to corrupt domestic governmental bodies through bribery (cf. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2897 (1989); *Town of Kearney* v. *Hudson Meadows Urban Renewal*, 829 F.2d 1263, 1268-1269 (3d Cir. 1987)), it also prohibits such activities directed to the decision-making processes of foreign governments, where the jurisdictional prerequisites of the statute are otherwise met. Petitioners do not contend otherwise. Cf. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985).[18] Petitioners likewise do not challenge the court of appeals' holding (Pet. App. A29-A30) that commercial bribery violates Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c), and is actionable under 15 U.S.C. 15.[19] The interest of the United States in enforcing Acts of Congress that apply to the conduct at issue, even though that conduct had extraterritorial effects as well, is an important factor in the comity analysis. See *Societe Nationale*, 482 U.S. at 545 n.29.

2. It is true that the laws of Nigeria may also have applied to petitioners' primary conduct, insofar as that country had jurisdiction over persons involved in efforts to corrupt its governmental processes. But there is no conflict between the governing laws of the two nations in this respect, since Nigeria, like virtually all countries, prohibits the payment of bribes to its officials in connection with the performance of their duties.[20] In this re-

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[18] The Court did not grant review of the court of appeals' holding (Pet. App. A22-A24) that the complaint sufficiently alleges a pattern of racketeering activity under RICO.

[19] See also *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966), cited in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972).

[20] See Decree No. 38, §§ 1-8 (Nov. 22, 1975) (J.A. 146-164, 182-211). See also H.H. Marshall, *The Laws of Northern Nigeria*,

spect, the laws of the two nations that address the primary conduct at issue do not, standing alone, suggest that adjudication of respondent's claims under United States law would offend principles of comity. Compare *Societe Nationale*, 482 U.S. at 541-546.

This conclusion is consistent with the decision in *American Banana*, the Court's leading case considering the act of state doctrine in a suit arising directly under United States law. The act of state ruling there rested in large part on the premise that the conduct of the defendant, including its efforts to persuade the Government of Costa Rica to expropriate the competitor's land, was legal under the laws of that country. See 213 U.S. at 357-359 (quoted at page 12, *supra*). This reading of *American Banana* is confirmed by *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), which was an injunctive action alleging that the defendants had conspired in the United States to monopolize and restrain trade in sisal by, *inter alia*, securing passage of favorable legislation in Mexico. In holding that the complaint stated a valid claim for relief, this Court distinguished *American Banana* as involving "acts done outside the United States and not unlawful by the law of the place" (274 U.S. at 276). Here, as we have said, conduct such as that alleged by respondent is illegal under the law of Nigeria.

Moreover, in *Sisal Sales*, "[t]he United States complain[ed] of a violation of their laws within their own territory by parties subject to their jurisdiction, not

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ch. 89, §§ 115-122 (1965); D. Kingdon, *The Laws of the Federation of Nigeria and Lagos*, Criminal Code, ch. 42, §§ 98-101, 104 (1958). The legislative history of the Foreign Corrupt Practices Act shows Congress's understanding that "virtually every country has its own laws against bribery, although some are not vigorously enforced." S. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976). See also J.A. 176-178 (survey of antibribery laws of 65 nations). Different considerations would be raised if the receipt of payments was not illegal under the law of the other country. The FCPA contains express exceptions for such situations. 15 U.S.C. 78dd-1(c)(1), 78dd-2(c)(1).

merely of something done by another government at the instigation of private parties" (274 U.S. 276). Although "the conspirators were aided by discriminating legislation," they were "within the jurisdiction of our courts and [could] be punished for offenses against our laws" (*ibid.*). Similarly here, respondent complains of injuries sustained as a result of alleged violations of United States law committed by persons within the legislative jurisdiction of the United States. Equitable considerations, which have been deemed relevant under the act of state doctrine,[21] suggest that an act "done by another government" at the allegedly corrupt "instigation of private parties" should not stand as a bar to a suit against those private parties, if the suit can proceed in a manner that is consistent with foreign relations concerns.[22]

3. Because respondent has brought this action against petitioners, not the Government of Nigeria or its officials, the courts below would not be required to adjudicate the validity of an act of the Nigerian Government under principles of Nigerian law. That factor, too, diminishes the potential for conflicts between the laws and interests of the two nations. It also distinguishes this case from *Underhill*, *Sabbatino*, and other cases in which the suit squarely challenged an exercise of sovereign authority.

At least in the present context, this conclusion is not altered by the fact that adjudication of respondent's claims may require a United States court to determine whether the award of the contract was caused by bribes. The issue of causation would be addressed only to determine the *domestic* consequences of petitioners' conduct, by identifying the intended and foreseeable consequences

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[21] See *Alfred Dunhill*, 425 U.S. at 703-704; *First National City Bank*, 406 U.S. at 768-769 (opinion of Rehnquist, J.); *id.* at 770-773 (Douglas, J., concurring).

[22] This is not a situation, like that in *Sabbatino*, where the Executive Branch is seeking redress from the foreign sovereign itself for injuries sustained by United States nationals and the adjudication of a private suit could interfere with those diplomatic efforts.

abroad of the acts they committed within the legislative jurisdiction of the United States.[23] Nor is a different conclusion required because such an adjudication may establish an evidentiary basis for inferring that Nigerian officials may have violated Nigerian law, thereby permitting Nigeria to regard the contract as void or voidable.[24] Respondent does not request the United States

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[23] Because the act of state doctrine requires that the foreign sovereign's *act*, not simply its law, be given controlling effect, the doctrine has been described as a rule of repose, similar to issue or claim preclusion in judicial proceedings. See J. Dellapenna, note 10, *supra*, at 44-52. Under this view, the act of a foreign state is analogous to the judgment of a court that conclusively resolves all relevant legal issues under controlling law. It is significant for purposes of this analogy that corruption of the court, unlike mere error in its application of governing law, is an accepted ground for the court to set aside its judgment—or, in appropriate circumstances, for allowing a collateral attack on the judgment in a separate proceeding in another forum. Restatement (Second) of Judgments §§ 70(1)(a) and comment b, 82 (1982). Here, because respondent's claims of corruption arise under United States law and are principally brought against other United States nationals, a court of this Nation may be a convenient and suitable forum in which to litigate those claims, if the foreign policy interests of the United States do not require the court to stay its hand. Cf. *id.* § 82 and comment b.

[24] To be sure, if the Nigerian Government formally determined the contract to be void or rescinded the contract because it was tainted by corruption (and therefore voidable), there would be less basis for the contention that adjudication of respondent's claims under United States law based on the same transaction would implicate act-of state concerns. Compare *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285, 288-289 (1952).

Nigerian courts have held that illegality renders a contract invalid. *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. 220, 229, 232-236 (Sup. Ct. Nigeria); see also *George* v. *Dominion Flour Mills Ltd.*, [1963] 1 All. N.L.R. 71, 73-74 (Fed. Sup. Ct. Nigeria). Under these authorities, it would appear that violation by a Nigerian official of the proscription against bribery would render his award of a government contract invalid and the contract itself void (or voidable at the option of the government). See also J. Orojo, *Nigerian Commercial Law & Practice* 73-74 (1983); O. Achike, *Nigerian Law of Contract* 189-190 (1972). That also is the rule under English law (see, *e.g.*, *City of London Electric Light-*

courts actually to adjudicate any issues arising under Nigerian law that may be implicated by the evidence adduced. Thus, irrespective of the outcome of respondent's suit, the contract will retain whatever effect it otherwise has as a matter of *Nigerian law*, and that effect presumably will continue to be recognized in the United States. The contract simply will not be given the further effect, under the act of state doctrine, of precluding all inquiry by a United States court into the circumstances surrounding its formation, insofar as they are material to the adjudication of an alleged violation of *United States* law. Cf. *Societe Nationale*, 482 U.S. at 542-546.[25] Compare *Angle* v. *Chicago, St. P., M. & O. Ry.*, 151 U.S. 1, 16-22 (1894); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-177 (1965).

This analysis is supported by the decision in *Continental Ore*. There, the defendants had conspired in the United States to establish an exclusionary customer allocation program for sales of vanadium in Canada by utilizing the authority of a wholly owned subsidiary of

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ing Co. v. *Mayor of London*, [1903] App. Cas. 434 (H. L. (E.)), aff'g [1901] 1 Ch. 602, 613 (Rigby, L.J.)), which the law of Nigeria, as a former British colony, generally mirrors. See *Sodipo* v. *Lemminkainen Oy*, 1 N.W.L.R. at 232; T. Elias, *The Nigerian Legal System*, 12, 17-21, 214 (1963). Similarly, contracts between the United States and a private party that are tainted by corruption may be rescinded by the United States. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563-566 (1961); *Pan American Petroleum & Transp Co.* v. *United States*, 273 U.S. 456, 500 (1927); *Crocker* v. *United States*, 240 U.S. 74, 81 (1916).

[25] Unlike the French blocking statute in *Societe Nationale* (482 U.S. at 526 n.6, 544-545 n.29), there is no suggestion here that the Nigerian statutes governing the award of military contracts or prohibiting bribery were intended to bar an inquiry into such matters by a United States court. See *Angle* v. *Chicago, St. P., M. & O. Ry.*, 151 U.S. 1, 21-22 (1894). We express no view on whether other aspects of international comity that are distinct from those informing the act of state doctrine—*e.g.*, principles of comity concerning the production of evidence in Nigeria or pertaining to the affairs of its Government—may properly be invoked in further proceedings in this case.

one of the defendants as the exclusive purchasing agent for the Canadian government. In upholding the claim, the Court analogized the case to *Sisal Sales*, again distinguishing *American Banana* (370 U.S. at 705 & n.13), and continued (*id.* at 706):

> In the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government or by its Metals Controller. * * * As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.
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> * * * [T]here is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.

Here, as in *Continental Ore*, there is no indication that the specific acts of petitioners on which respondent bases its claim of injury—namely, alleged racketeering activities leading to the payment and receipt of bribes by the agent of a foreign government—were approved by the Nigerian Government itself.[26]

4. It also is significant for the comity analysis that the payments allegedly were made to induce officials of the Nigerian Government to enter into a commercial relationship, not to perform acts that would remain of a distinctly sovereign nature in all respects. As explained above, four Justices concluded in *Alfred Dunhill* that the

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[26] In addition, because there is no indication that the Nigerian Government has officially concluded that the contract was unaffected by any payments that might have been made by petitioners or that the contract should be ratified despite any such defects, a ruling by a United States court that the contract was awarded because of corruption in which United States nationals were involved would not exhibit a lack of respect for any *specific* determination by the foreign government regarding the integrity or continuing force of its contracting decision. Cf. *Hilton* v. *Guyot*, 159 U.S. at 163-164; compare *Alfred Dunhill*, 425 U.S. at 695.

act of state doctrine should not be applied to bar adjudication of a claim based on Cuba's repudiation of a commercial obligation. 425 U.S. at 695-706 (opinion of White, J.). The plurality relied on several factors. First, this result would not create a threat of embarrassing conflicts with the Executive Branch in its conduct of foreign relations; indeed, the Department of State took the position that purely commercial activity, as distinguished from public or sovereign acts, should not be regarded as the sort of conduct to which the doctrine applies. 425 U.S. at 696-698. Second, under the restrictive theory of foreign sovereign immunity adopted by the Executive Branch in the 1952 "Tate Letter," a sovereign is not immune from suit for its commercial acts. *Id.* at 698-703, 705. Third, adjudicating the validity of a sovereign's commercial acts, as opposed to its governmental acts, is less likely to constitute an affront, since in their commercial capacities foreign governments do not exercise powers unique to sovereigns and are subject to generally accepted standards of conduct; conversely, refusing to adjudicate could cause unwarranted hardship for persons engaged in international commerce. *Id.* at 703-704.

The factors upon which the *Alfred Dunhill* plurality relied suggest a similar result here. We do not take issue with the court of appeals' holding that the decision to award a military construction contract reflects a sufficiently formal and substantial expression of governmental interests to be regarded as a sovereign act for purposes of the act of state doctrine. Pet. App. A12-A13, A57; see also *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982); *Northrop Corp* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir), cert. denied, 464 U.S. 849 (1983). But the contractual relationship between Nigeria and Kirkpatrick that commenced upon the award of the contract *would* be regarded as "commercial activity" for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2).[27] It

[27] Under the FSIA, the commercial character of an activity is determined "by reference to the nature of the course of conduct or

therefore presumably would also be regarded as commercial for purposes of the "commercial activity" exception to the act of state doctrine that was endorsed by the plurality opinion in *Alfred Dunhill*, since that view was based in part on sovereign immunity principles that are now incorporated in the FSIA.[28] Thus, although this case, unlike *Alfred Dunhill*, does not involve conduct by a foreign government in the course of an on-going commercial relationship, the fact that petitioners' alleged conduct related to a prospective commercial relationship —and therefore resembled ordinary commercial bribery between private parties (see, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37 (1979))— is relevant in deciding whether the international comity aspects of the act of state doctrine require that it be applied to bar adjudication of this case. Cf. *Alfred Dunhill*, 425 U.S. at 703-704 (opinion of White, J.).[29]

B. Separation Of Powers

The result suggested by principles of international comity is confirmed by reference to the "constitutional underpinnings" of the act of state doctrine. Those underpinnings, and their relation to principles of comity, require consideration of the roles of the political Branches

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particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). "Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976).

[28] The House Report on the FSIA expressed approval of the Solicitor General's position on the act of state issue in *Alfred Dunhill*. H.R. Rep. No. 1487, *supra*, at 20 n.1.

[29] The instant case also differs from those in which American defendants were alleged to have corruptly induced a foreign sovereign to award rights to exploit natural resources. *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, *supra*; *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). The development of a nation's depletable resources implicates its distinctly sovereign interests to a greater extent than does the award of a procurement contract, which may be of only episodic interest to its government.

in the conduct of foreign affairs—and, accordingly, of the relation of those Branches to the subject of the litigation.

1. When the official act of a foreign government in matters affecting its sovereign interests is questioned in the courts of the United States, even in a suit between private parties, the litigation necessarily affects the national interests of the United States and the other country (as well as other countries), not merely those of the private litigants. Any assessment of the respective national interests in this setting must be greatly influenced by the foreign policies and sensibilities of the two nations and other nations and by the standards of conduct among nations (and their respective nationals) that are adhered to and advocated by the United States. Under the Constitution, those are subjects that the President and Congress have primary responsibility for ascertaining, articulating and implementing. See *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936); U.S. Const., Art II, § 2, Cl. 2 (Treaty Clause); Art. I, § 8, Cl. 3 (Congress shall have power to "regulate Commerce with foreign Nations"); Art. I, § 8, Cl. 10 (Congress shall have power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). Accordingly, a United States court should give great weight to the views of the Executive Branch (and relevant acts of Congress) as to whether the national and foreign relations interests of the United States suggest that the applicable rule of decision should be supplied by the act of a foreign sovereign or drawn from some other source, such as domestic or international law.

This understanding is reflected in *Sabbatino* itself. There, as we have noted, the Executive Branch had strenuously urged in the diplomatic arena that the expropriation by the Cuban Government violated principles of international law advocated by the United States. But the Executive Branch took the equally firm position in this Court that, for reasons pertaining to the conduct of the Nation's foreign relations, those principles should

not be applied by United States courts to determine whether the expropriation was valid for purposes of resolving disputed questions of title to property. See U.S. *Sabbatino* Br. 25-34. Thus, the Executive Branch argued, in substance, that the principles of international law that it espoused on a nation-to-nation basis were not self-executing and did not create private rights that were judicially enforceable in United States courts. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 692 (1989).

This Court agreed—largely for the reasons advanced by the Executive Branch—that "the matter [was] not meet for adjudication by domestic tribunals." 376 U.S. at 429 n.26. The result was to require recognition of the Cuban decree as the rule of decision. A different position of the Executive Branch in other circumstances (that the foreign relations interests of the United States do not require unquestioning recognition of the act of a foreign sovereign) would be entitled to great deference as well. This Court has recognized in other settings that, even in the absence of a formal treaty, the actions of the Executive in the conduct of foreign relations may create a rule of law to be applied in pending cases. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981); *United States* v. *Pink*, 315 U.S. at 226-234.

2. These constitutional underpinnings of the act of state doctrine do not suggest that it must be applied to bar respondent's suit here.

a. In *Sabbatino*, one of the factors upon which the Court relied in declining to adjudicate the validity of the expropriation decree under international law was the absence of a "treaty or other unambiguous agreement regarding controlling legal principles." 376 U.S. at 428. Thus, one aspect of the separation of powers component of the act of state doctrine concerns the allocation among the Branches of responsibility for articulating the rule of law that should be applied in evaluating the primary conduct at issue. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 312-317 (1981). That aspect is not at issue

in this case, because the Acts of Congress (and New Jersey law) upon which respondent relies supply the substantive standards for the district court to apply in evaluating petitioners' primary conduct.[30]

b. Respondent of course must further prove that it was injured by reason of the primary conduct that was made illegal under domestic law, and it therefore must make a prima facie showing that payments allegedly made by petitioners caused Nigerian officials to award the contract to them. It is this feature of respondent's cause of action that triggers the separation of powers component of the act of state doctrine, because it implicates the foreign relations concerns for which the political Branches have primary responsibility.

However, we have been advised by the Department of State that, in its judgment, adjudication of this case would not be inconsistent with the conduct of the foreign relations of the United States, even though the district court would be required to determine whether the contract was awarded to petitioners because of payments they made to Nigerian officials. See App., *infra*, 1a-2a. To be sure, where the act of a foreign government is itself a direct and immediate cause of the plaintiff's injury, an inquiry into the "motivation" for that act might in other circumstances raise significant act of state concerns, since the effect of such an inquiry is to impugn the integrity or ingenuousness of the act, even if its validity is not questioned. See pages 37-39, *infra*. But in this regard, we have been further advised by the Department of State that, in the absence of an affirmative representation to the contrary by the Executive Branch, adjudication of private suits under United States law that solely involve commercial bribery of foreign officials

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[30] In *Sabbatino*, a treaty or unambiguous agreement would have served the additional purpose of assuring the Court that application of the principles of international law it was urged to invoke were accepted by Cuba or at least were consistent with general principles of international comity. In this case, that purpose is served by the virtual universality of prohibitions against bribery, including those of Nigeria. See note 20, *supra*.

by United States firms would not generally embarrass the conduct of foreign relations, so long as the validity of the act of the foreign state is not questioned. App., *infra*, 1a-2a.[31]

In informing the Court of this assessment, we do not urge that the view of the Executive Branch that the adjudication may go forward would be binding on the courts—a position endorsed by the Second Circuit in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (1954), as that decision was understood by this Court in *First National City Bank*.[32] In general, however, where application of the doctrine may turn on an assessment of the foreign policy interests of the United States, including an assessment of the impact of judicial proceedings in this country on the sensibilities of foreign nations, a court should not undertake to determine those

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[31] Reference to the views of the Executive in this fashion is supported by the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That Amendment provides that no court in the United States shall decline, on act of state grounds, to make a determination on the merits under international law in certain cases involving a confiscation of property, unless, inter alia, "the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." We note as well that the letter of the Legal Adviser upon which the plurality relied in *First National City Bank* took the position that counterclaims should not be permitted to proceed if the foreign policy interests of the United States require application of the act of state doctrine in the particular case. See 406 U.S. at 781 (Brennan, J., dissenting).

[32] As explained above (see pages 17-18 and note 16, *supra*), although the opinion for three Justices in *First National City Bank* endorsed a "*Bernstein* exception," the concurring and dissenting opinions rejected that approach. This case of course differs from *First National City Bank* because it does not involve a direct challenge to the validity of the foreign sovereign act itself, and we do not suggest in this case that the courts below should be permitted to adjudicate that question. We suggest only that the Court should give great weight to the Executive Branch's determination that, in the commercial bribery setting, an inquiry into whether that act was corruptly induced by United States nationals would not, as a general matter, embarrass the conduct of foreign relations.

questions for itself. Rather, as the district court did in this case, it should solicit the views of the Executive Branch in these matters, and should give those views the greatest deference in determining whether foreign policy concerns, together with considerations made relevant by other components of the act of state doctrine, require that the court give effect to the act of a foreign state.[33]

c. The foreign policy assessment by the Department of State is consistent with the legislative determination underlying the Foreign Corrupt Practices Act. The FCPA makes it a criminal offense for any "domestic concern"[34] to use the mails or any instrumentality of interstate or foreign commerce to pay or offer anything of value to an official of a foreign government for the purpose of influencing him to assist the domestic concern to obtain or retain business with the foreign government or any other person. 15 U.S.C. 78dd-2(a), (g) and (h)(5).[35] This prohibition was enacted in 1977[36] in response to an investigation by the Securities and Exchange Commission revealing a widespread practice among more than 300 Americans companies of making payments, totalling hundreds of millions of dollars, to officials of foreign governments in order to secure busi-

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[33] Thus, even in the commercial bribery context, if a trial court determines that distinct foreign policy interests of the United States may be involved, it should request the views of the Department of State, through the Department of Justice.

[34] The term "domestic concern" is defined to mean a citizen or resident of the United States, or any corporation organized under the laws of a State or doing business in the United States. 15 U.S.C. 78dd-2(h).

[35] Similar prohibitions are imposed on certain issuers of securities covered by the federal securities laws. See 15 U.S.C. 78dd-1. Both provisions also bar payments to a foreign political party for the same purposes. 15 U.S.C. 78dd-1(a)(2), 78dd-2(a)(2).

[36] Pub. L. No. 95-213, §§ 103, 104, 91 Stat. 1495, 1496. The FCPA was revised and reenacted by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1415.

ness with them. S. Rep. No. 114, 95th Cong., 1st Sess. 3 (1977).

Congress concluded that such payments seriously undermine the foreign policy interests of the United States. The House Report explained that "[t]he revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R. Rep. No. 640, 95th Cong., 1st Sess. 5 (1977). The Senate Report on a predecessor bill further observed that payments to foreign officials by American companies "undermine[] the foreign policy objective of the United States to promote democratically accountable governments and professionalized civil services in developing countries." S. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976). See also S. Rep. No. 85, 100th Cong., 1st Sess. 46-47 (1987).

Congress recognized that it was relatively unusual to give extraterritorial effect to United States law, but it believed that overriding interests of this Nation justified doing so, especially since the statutory proscription reaches only United States nationals and other persons having a substantial nexus to the United States and only conduct that has a direct effect upon the United States. See S. Rep. No. 1031, *supra*, at 5, 15-17; H.R. Rep. No. 640, *supra*, at 12 & n.2. Congress also rejected the contention that no legislation should be enacted because some foreign countries might resent attempts to export American morality or impose American standards on transactions taking place there.[37] The Senate Committee, for example,

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[37] In *American Banana*, 213 U.S. at 356-358, the Court applied strict territorial principles to the application of United States law. But it also recognized that one sovereign nation, in cases affecting its "national interests," might go further and seek to punish acts committed by its citizens within another jurisdiction, as Congress had done under the Logan Act (Rev. Stat. § 5335 (1875), now codified at 18 U.S.C. 953). That Act proscribes criminal correspondence by United States citizens with foreign governments to

expressed the belief that "most countries would welcome a greater effort by the United States to discourage offensive conduct by U.S. companies, wherever their activities may take place," and it quoted the opinion of the Attorney General of Botswana that "most Third World countries would want to cooperate to the fullest extent possible, with the U.S. and other home countries," to make sure that offenders are punished (S. Rep. No. 1031, *supra*, at 4, 5).

To be sure, respondent has not sought to bring this action under the FCPA, and there is substantial reason to doubt that the FCPA should be construed to confer an implied private right of action on a competitor. The FCPA expressly entrusts enforcement responsibility to the Attorney General and the SEC, who can take foreign policy considerations into account in deciding whether to pursue a particular investigation or civil or criminal prosecution. 15 U.S.C. 78dd-1, 78dd-2; see *Clayco*, 712 F.2d at 408-409. Furthermore, although the effect on domestic competition was one undesirable consequence of bribery of foreign government officials cited in the legislative history, the prohibited-payment provisions of the FCPA were not enacted for the especial benefit of competitors. Rather, Congress sought to benefit the Nation as a whole, by promoting what it believed to be the Nation's foreign policy interests and the interests of the entire business and financial community. See S. Rep. No. 114, 95th Cong., 1st Sess. 3-4 (1977); H.R. Rep. No. 640, *supra*, at 4-5. Finally, and significantly, an early version of the FCPA would have *expressly* conferred a private right of action on competitors (S. 3379, 94th Cong., 2d Sess. § 10 1976, *reprinted in* 122 Cong. Rec. 12,605, 12,607 (1976)), but the Senate Committee deleted that provision from the bill reported in the 94th Congress. S. Rep. No. 1031, *supra*, at 13. The Senate Report stated that the Committee "may offer a floor amendment relating to competitors rights of action" if

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influence their actions in disputes with the United States. See 213 U.S. at 356. The enactment of the FCPA has a similar thrust.

"more acceptable language" could be devised (S. Rep. No. 1031, *supra*, at 13), but no such amendment was offered or adopted.[38]

Because respondent does not urge the Court to recognize a private right of action under the FCPA, we do not take a definitive position on that question here.[39] But even if the FCPA cannot be enforced in a private civil action brought by a competitor, the congressional judgment embodied in the FCPA that bribery of foreign officials by United States nationals should be made illegal under United States law, and that cases concerning such conduct may be adjudicated in United States courts in some circumstances, accords with the State Department's foreign policy judgment that the act of state doctrine need not be applied as an absolute bar to all suits brought under other federal statutes reaching the same course of conduct.[40] By the same token, because the

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[38] The House Report stated that the Committee "intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery" (H.R. Rep. No. 640, *supra*, at 10). But during the debate on the Conference Report, Representative Devine stated that "the conferees did not intend to create a private right of action." 123 Cong. Rec. 38,778 (1977). Similarly, Senator Tower stated that although the House Report expressed an intent that the courts recognize implied private rights of action, "[t]his question was not considered in the Senate or during the conference, and thus [it] cannot be said that any intent is expressed at all on this issue." *Id.* at 38,602. He also observed that "[i]n view of the existing case law, it is difficult to believe that the courts would imply a cause of action in any event." *Ibid.*

[39] We also do not take a position on whether an implied right of action should be recognized on the part of shareholders under the accounting or prohibited-payment provisions of the FCPA.

[40] See *Sage Int'l* v. *Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979); contra *Clayco*, 712

FCPA vests enforcement responsibility in the Attorney General and the SEC, who may decline to proceed in a particular case if the foreign policy interests of the United States so require, the structure of the FCPA also reinforces our view that the Executive Branch must be afforded the opportunity, in appropriate circumstances, to suggest in a private civil action that those interests weigh against allowing the suit to proceed. Compare *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812).

C. The Court Should Not Adopt A Rule That Turns Solely On Whether Only The "Motivation" For A Foreign Sovereign Act Is At Issue

We do not urge the Court to adopt a rule that would attach dispositive significance to the fact that this suit involves only the "motivation" for, rather than the "validity" of, a foreign sovereign act.[41] In our view, some cases that concern only a foreign government's "motivation" plainly *do* raise substantial act of state concerns. See *Societe Nationale*, 482 U.S. at 537 n.23 ("Both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign states which have bargained as equals.")

For example, in *American Banana*, it could have been argued that the central issue was whether the decree was

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F.2d at 409. See also Note, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases*, 59 Notre Dame L. Rev. 455 (1984); Note, *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L. J. 407 (1984).

[41] We took the position in our amicus briefs at the petition stage in *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977); *Mitsui & Co.* v. *Industrial Inv. Dev. Corp.*, 445 U.S. 903 (1980); and *O.N.E. Shipping, Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 109 S. Ct. 303 (1988), that the act of state doctrine generally does not bar inquiry into the motivation for a foreign act, and the Legal Adviser reiterated that legal view in his letter to the district court in this case. As explained in the text, we propose a narrower approach to the "motivation" issue in this case.

"motivated" by the urgings of the United Fruit Company, rather than Costa Rica's own sovereign interests, because United Fruit presumably would have been liable under United States antitrust laws only if its actions were shown to have been the cause of the expropriation. Yet the suit was not permitted to go forward. In fact, the Court specifically noted that the suggestion that the perpetrator of the harm was merely the "tool" of the defendant "hardly could be listened to concerning a really independent state," and that it "of course" was "not alleged that Costa Rica stands in that relation to the United Fruit Company." 213 U.S. at 358-359. See also *Zschernig* v. *Miller*, 389 U.S. 429, 434, 436 (1968); *Langenegger* v. *United States*, 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985); *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 77-78 (2d Cir. 1977), cert. denied, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 110-111 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950 (1972); but see *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1539-1543 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986); cf. *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.28 (1983).[42]

Conversely, other decisions that have been characterized as allowing a suit to go forward because only the "motivation" of the foreign government was at issue may be explained on the alternative ground that the act of the foreign government did not reflect an assertion of substantial sovereign interests bearing on the merits of the controversy, or that it was simply part of the con-

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[42] In other cases, the validity of an act of state might turn so directly on its purpose that an inquiry into the latter necessarily would implicate the former. See, *e.g.*, *Hunt* v. *Mobil Oil Corp.*, 550 F.2d at 77-78; cf. *IAM* v. *OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

text in which essentially private conduct caused the injury. See *Clayco*, 712 F.2d at 407 (distinguishing *Industrial Inv. Dev. Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980), on this ground); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1294-1295 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-608 (9th Cir. 1976); see also *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d at 1047-1049.

In this case, moveover, it is significant to the State Department's determination regarding the foreign policy interests of the United States that respondent's claims implicate the allegedly corrupt *personal* motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government in awarding the contract. Cf. *Ex parte Young*, 209 U.S. 123 (1908). To be sure, such a suit may nevertheless be embarrassing to members of the government of the other nation involved, and it therefore may, in a sense, "embarrass" the conduct of the foreign relations of the United States. But the former consequence differs in principle from an affront to the sovereignty of the foreign nation itself, and the latter consequence is by no means inevitable. It may often be true, on balance and especially in the long run, that the foreign policy interests of the United States would be furthered by rooting out efforts by its nationals to corrupt the governmental processes of other nations. The government of the other nation also may have a strong interest in exposing and expunging corruption in its own affairs and cooperating to assure the availability of legal redress for injuries sustained (see *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1933 (1989)), or may be content to let matters unfold as they will in United States courts.[43]

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[43] Special considerations might weigh against permitting a suit that depended on proof that a law passed by the legislature of

We do not rule out the possibility that litigation in United States courts based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on "national nerves" (*Sabbatino*, 376 U.S. at 428) that the act of state doctrine or related principles of abstention would appropriately be found to bar the suit.[44] But on the basis of the representations by the Department of State concerning the foreign relations interests of the United States in the setting of this case, we do not believe that the act of state doctrine should be regarded as a complete bar to such suits.

---

another nation (as distinguished from an act committed in the execution of the law) was the product of corruption. *See Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130-131 (1810). A suit that depended on proof of corruption of the head of state or head of government of another nation likewise might raise special sensitivities and countervailing considerations. A refusal to entertain such a suit would draw some support from the rule of absolute immunity for a head of state or head of government in United States courts (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 137-138; cf. *Alfred Dunhill*, 425 U.S. at 698-703 (opinion of White, J.)), at least where the foreign sovereign has not dispensed with that immunity (cf. *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110-1111 (4th Cir.), cert. denied, 484 U.S. 890 (1987); *Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 360-361 (2d Cir. 1986), cert. denied, 481 U.S. 1048 (1987)) or with any special protections that would otherwise be afforded by the act of state doctrine in this setting. *Republic of the Philippines* v. *Marcos*, 862 F.2d at 1360-1361.

[44] In addition, as the Legal Adviser cautioned in his letter to the district court (Pet. App. A34-A37), United States courts adjudicating such claims must take care in their control of discovery and related matters to demonstrate a due respect for sovereign interests expressed by the foreign state. See *Societe Nationale*, 482 U.S. at 545-546; Pet. App. A19-A20 n.11.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1989

APPENDIX

[SEAL]

United States Department of State

The Legal Adviser
Washington, D.C. 20520

July 25, 1989

The Honorable
Kenneth W. Starr,
The Solicitor General,
Department of Justice,
Washington, D.C.

Dear Judge Starr:

The views of this Department have been requested concerning the foreign relations implications of adjudication of the claims of the respondent Environmental Tectonics Corporation (ETC) in *W.S. Kirkpatrick & Co., Inc., et al.* v. *Environmental Tectonics Corp., International*, now pending in the Supreme Court on a writ of *certiorari* to the Court of Appeals for the Third Circuit.

We understand from the nature of the allegations made by ETC that in order to prevail at trial on the merits, it may well be necessary for ETC to offer evidence to establish that but for certain alleged payments by defendant Kirkpatrick to Nigerian Government officials, ETC, and not Kirkpatrick, would have been awarded the contract for the Nigerian Air Force aeromedical facility. Such evidence could involve the disclosure of the identity of the foreign officials alleged to have received such payments, and other matters as may be relevant to the motivation behind the award of the contract.

Any litigation that involves, directly or indirectly, a foreign government has the potential for affecting the relations of the United States with that country. We do not, however, regard a bare potential for affecting U.S.

foreign relations as sufficient, in and of itself, to warrant dismissal. Cases could arise which present an unacceptable risk that adjudication would embarrass the Executive Branch in its conduct of U.S. foreign relations, leading the Executive to suggest the desirability of judicial abstention. We do not regard *Environmental Tectonics* as such a case, and we do not see any foreign relations obstacles to its adjudication on the merits. We also believe that, in the absence of a representation to the contrary, the courts may properly assume that no unacceptable interference with U.S. foreign relations will occur on account of the adjudication of like cases.

I understand that some uncertainty in the foregoing regard may have arisen from my December 10, 1986 letter to the District Court, in which I noted *inter alia* that

> . . . inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

659 F. Supp. at 1403. As the Court of Appeals concluded, these observations were intended to remind the trial court to exercise "appropriate supervision" over the trial process so as to "limit damage to foreign sensibilities." 847 F.2d at 1062, note 11.

Sincerely,

/s/ Abraham D. Sofaer
ABRAHAM D. SOFAER

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No. 87-2066

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

W.S. KIRKPATRICK & CO., INC., *et al.*,
Petitioners,

v.

ENVIRONMENTAL TECTONICS CORPORATION,
INTERNATIONAL,
Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE REPUBLIC OF CHINA AS *AMICUS CURIAE*

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IN THE

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OCTOBER TERM, 1989

No. 87-2066

W.S. KIRKPATRICK & CO., INC., *et al.*,
Petitioners,

v.

ENVIRONMENTAL TECTONICS CORPORATION,
INTERNATIONAL,
Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE REPUBLIC OF CHINA AS *AMICUS CURIAE*

This *amicus curiae* brief is submitted in support of petitioner W.S. Kirkpatrick & Co., Inc. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus, the Republic of China, is a sovereign state with close commercial and political ties to the United States. The Republic of China is one of the United States' largest trading partners and accounts for a significant portion of foreign investment in the United States. One important aspect of the substantial bilateral trade between the Republic of China and the United States has been the Republic's policy of effectively encouraging U.S. companies to bid for government construction and other projects in the Republic of China.

Amicus thus has two related interests in the application of the Act of State doctrine in this case. First, the extensive commerce between the two countries has inevitably led to disputes between U.S. citizens and either the Republic of China itself or its citizens. As a result, the Republic of China has not infrequently found itself involved in U.S. court proceedings in which its actions have been brought into question. The Republic of China thus has regularly observed the application of the Act of State doctrine and its role in removing U.S. courts from situations where ruling on pending claims could jeopardize U.S. foreign relations with sovereign states.

Second, the Republic of China is concerned about the consequences of permitting disgruntled bidders to challenge foreign government contract awards in U.S. courts by alleging improprieties in the foreign government's award process. These actions would necessarily discourage U.S. companies from bidding, and foreign governments from making, awards to U.S. competitors.

ARGUMENT

This case requires U.S. courts to determine whether the Act of State doctrine precludes adjudication of a claim that a U.S. company obtained a government construction contract from a foreign government by paying bribes to high officials of that government that were illegal under U.S. law. Unlike the earlier federal prosecution of the defendant U.S. company, the present action would require U.S. courts to determine whether the alleged bribes were actually paid (rather than merely offered) and, if paid, whether they caused the foreign government to award the contract to the U.S. company.

This case touches upon several fundamental questions concerning application of the Act of State doctrine—questions that have been vigorously debated by lower courts and commentators for years. In addressing these questions, *amicus* Republic of China urges the Court to avoid

resort to mechanical formulae, such as whether the foreign government's act of awarding a contract was "commercial" rather than "governmental," or whether the case requires inquiry into the "validity" of the foreign government's acts or merely into its "motivations." Rather, the Act of State doctrine is a flexible, pragmatic rule, whose scope should be determined by reference to the purposes underlying the doctrine.

The Act of State doctrine reflects two fundamental concerns. First, and most important from the point of view of foreign nations, the Act of State doctrine is an expression of the general principle of international comity, which admonishes that nations should generally respect and give effect to foreign governmental interests and public policies. Nonetheless, it is clear that U.S. public policy must limit the extent to which U.S. courts defer to foreign nations and their governmental interests. The task of ascertaining U.S. policies implicates the second indispensable principle underlying the Act of State doctrine—the U.S. constitutional principle of separation of powers. This principle provides that it is for the Executive and Legislative Branches—not the Judiciary—to articulate the policy of the United States towards foreign nations and to conduct foreign relations with other countries.

Informed by these underlying principles of comity and separation of powers, this Court should apply the Act of State doctrine to preclude adjudication of the claims presented in this case. The award of the foreign government contract here was a sovereign Act of State—despite its arguably "commercial" nature—because it was taken by high foreign government officials, within the territory of the foreign sovereign, pursuant to foreign laws and regulations reflecting important public policies of the foreign sovereign, and because the claim involved here challenges the integrity and regularity of the internal decision-making process of the foreign government. Similarly, the trial court in this case is being asked to "sit in judgment"

on the foreign Act of State. Although the challenge to the contract award in this case arguably does not extend to the "validity" of the foreign sovereign act, the relief requested would nonetheless be fundamentally inconsistent with foreign public policy and sovereign interests. If there were corruption in high levels of a foreign government, it would be for that government—not for U.S. trial courts—to address. On a subject that touches so sharply on "national nerves," foreign governments should be left free to pursue the alleged corruption of their officials according to their own procedures, at times of their own choice, and in formats of their own selection.

Finally, there is no U.S. public policy that would override application of the Act of State doctrine in this case. Because neither the Legislative nor the Executive Branch has clearly articulated any U.S. public or foreign policy requiring adjudication of this dispute, the Act of State doctrine precludes U.S. courts from going forward.

I. THE ACT OF STATE DOCTRINE IS A WELL-ESTABLISHED PRINCIPLE OF AMERICAN JURISPRUDENCE.

Since the very inception of the United States, the sovereign acts of foreign nations have been challenged in U.S. state and federal courts. Foreign nations have looked primarily to the Act of State doctrine to limit the permissible scope of such challenges and to ensure that appropriate judicial respect will be given to their interests and public policies.[1]

[1] In some circumstances, the doctrine of foreign sovereign immunity (now codified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 to 1611 (1982 & West Supp. 1989) ("FSIA")) can also require U.S. courts to defer to the actions of foreign nations. The FSIA differs fundamentally, however, from the Act of State doctrine. Many of the FSIA's protections apply based on the status of the defendant as a foreign sovereign regardless of the governmental character of the actions involved, whereas the Act of State doctrine applies based on the governmental character of the actions involved regardless of whether the action names a foreign

The Act of State doctrine is a fundamental and well-established principle of U.S. jurisprudence. Long before the founding of the United States, the Act of State doctrine had appeared in the English common law.[2] And soon after independence the doctrine was invoked by U.S. courts in a series of cases, most notably *The Schooner Exchange v. McFaddon*.[3]

This Court stated the classic formulation of the Act of State doctrine in its 1897 decision in *Underhill v. Hernandez*: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the

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sovereign as defendant. *See* G. Born & D. Westin, *International Civil Litigation in United States Courts* 506-07 (1989); Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 11 (1987).

[2] The Act of State doctrine dates to at least 1673, when it was invoked by an English court to give effect to a patent granted by the King of Denmark. *Blad's Case*, 3 Swans. 603, 36 Eng. Rep. 991 (P.C. 1673), *aff'd sub nom., Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674). *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). Later in *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1844), *aff'd*, 2 H.L. Cas. 1 (1848), the House of Lords refused to consider a suit by the Duke of Brunswick challenging an instrument, executed by King William IV and confirmed by the German Diet, which placed him under the guardianship of the King of Hanover. Among other things, the House of Lords reasoned: "if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it . . . . [I]f it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong." *Id.* at 21. *See Underhill v. Hernandez*, 65 F. 577 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897) (relying on *Duke of Brunswick* as an Act of State decision). *See also* Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 Va. J. Int'l L. 433, 437-40 (1982).

[3] 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C. J.). *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253 (1816); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822).

government of another done within its own territory." [4] This formulation has been repeatedly reaffirmed throughout this century.[5]

More recently, in *Banco Nacional de Cuba v. Sabbatino*,[6] the Court extended the Act of State doctrine to preclude U.S. adjudication of claims that an expropriation violated international law. Since *Sabbatino*, the Court has grappled with proposed "exceptions" to the Act of State doctrine for "purely commercial acts" by foreign states [7] and for cases where the U.S. government has expressly represented that adjudication will not interfere with U.S. foreign relations.[8] Yet these cases have continued to affirm the vitality and fundamental importance of the basic Act of State doctrine.[9]

Quite apart from the extensive body of law articulated by this Court, the state and lower federal courts have issued literally hundreds of decisions on the Act of State doctrine.[10] Nor is the Act of State doctrine found in the

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[4] 168 U.S. 250, 252 (1897).

[5] *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *United States v. Belmont*, 301 U.S. 324, 327-29 (1937); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972); Restatement (Third) of Foreign Relations Law § 443 (1987).

[6] 376 U.S. 398 (1964).

[7] *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

[8] *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759.

[9] *First Nat'l City Bank*, 406 U.S. at 762-63, 765-67; *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

[10] *See* Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. Fed. 707 (1972 & Supp. 1988).

jurisprudence of the United States alone. Specifically relying on this Court's decisions, a number of nations around the world have recognized some form of the doctrine.[11]

Despite the long history and importance of the Act of State doctrine, various commentators over the years have urged reformulating or abolishing the doctrine.[12] Some have gone so far as to propose legislation to curtail the doctrine substantially.[13] All of these efforts have been rebuffed. The American Law Institute recently reaffirmed the classic statement of the doctrine,[14] while Congress has refused to adopt legislation aimed at overruling the Act of State doctrine.[15] And this Court has repeatedly reaffirmed the importance and viability of the basic Act of State doctrine.

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[11] *See* Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 12 (1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 421 n.21; 6 M. Whiteman, *Digest of International Law* 1-20 (1970).

[12] *E.g.*, Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986); Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68 (1985); Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 Law & Pol'y Int'l Bus. 369 (1980).

[13] *See* S. 2633, 96th Cong., 2d Sess., 126 Cong. Rec. 9,452-53 (1980); S. 1434, 97th Cong., 1st Sess., 127 Cong. Rec. 13,959-60 (1981) (proposals by Senator Charles Mathias, Jr.); *See* Mathias, *Restructuring the Act of State Doctrine* at 408-12; Bazyler, *Abolishing the Act of State Doctrine* at 393-94; *but see*, Longo, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 Va. J. Int'l L. 103 (1982).

[14] *See* Restatement (Third) of Foreign Relations Law § 443 (1987).

[15] Congress instead recently enacted a statute establishing a narrow exception to the Act of State doctrine, applicable in proceedings to enforce or confirm certain international arbitration agreements or awards rendered against foreign states. *See* Act of Nov. 16, 1988, Pub. L. No. 100-669, § 1, 102 Stat. 3969 (codified at 9 U.S.C. § 15 (1988)).

II. THE ACT OF STATE DOCTRINE IS BASED ON THE DUAL PRINCIPLES OF INTERNATIONAL COMITY AND SEPARATION OF POWERS.

Commentators and courts have suggested an array of justifications for the Act of State doctrine. Some have described the doctrine as a choice-of-forum device.[16] Others have said it is a choice-of-law principle,[17] or a rule of issue preclusion.[18] And perhaps most frequently, the Act of State doctrine has been described as a principle of judicial abstention or restraint.[19] Although each of these characterizations may be apt in a particular case,[20] none

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[16] *Oetjen*, 246 U.S. at 304.

[17] Leigh & Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 Va. J. Int'l L. 685, 715-16 (1976); *Alfred Dunhill*, 425 U.S. at 705 n.18; *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[18] *National Am. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 640 n.30 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

[19] *E.g.*, *Alfred Dunhill*, 425 U.S. at 715 (Powell, J., concurring in judgment); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 74 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Phoenix Canada Oil Co. v. Texaco Inc.*, 560 F. Supp. 1372, 1381 n.27 (D. Del. 1983), *aff'd in part and rev'd in part*, 842 F.2d 1466 (3d Cir.), *cert. denied*, 109 S. Ct. 259 (1988).

[20] Depending upon the circumstances in which it is invoked, the Act of State doctrine can function as a choice-of-forum, choice-of-law or abstention device. For example, in cases such as *Oetjen v. Central Leather Co.*, 246 U.S. at 304, the Act of State doctrine was invoked to require a U.S. plaintiff to pursue his remedies in foreign courts or through diplomatic negotiations in which his claim would be sponsored by the U.S. Government; this amounted to a refusal by the U.S. court to apply either U.S. or foreign law. In contrast, in *Sabbatino* the Act of State doctrine was invoked to validate a foreign Act of State and thereby permit a foreign plaintiff to recover property from a U.S. defendant; this amounted to a choice of foreign law that the U.S. court applied. *See* Restatement (Third) of Foreign Relations Law § 443, Reporters' Note 1 (1987) ("In most cases, the act of state doctrine may be seen as a special

adequately reflects the two fundamental bases for the Act of State doctrine: the principle of international comity and the principle of separation of powers.

A. The Principle of International Comity.

The Act of State doctrine had its origins in the principle of international comity. In *The Schooner Exchange v. McFaddon*, Chief Justice Marshall traced both the common law rule of sovereign immunity and the Act of State doctrine to notions of comity among nations.[21] Similarly, this Court's classic statement of the Act of State doctrine in *Underhill v. Hernandez* was foreshadowed by an earlier state court decision where the court reasoned that:

> "[w]e think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sit-

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rule of conflict of laws."); Restatement (Second) of Foreign Relations Law § 41, comment c (1965).

The Act of State doctrine has also sometimes been tied to the constitutional doctrine of "political question." *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) at 146 ("questions to which such [sovereign] wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428 ("the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it"). The Act of State doctrine is, however, entirely distinct from the political question doctrine. The latter is an Article III limitation on the jurisdiction of the federal courts, which generally applies to a different category of cases. *See Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring); *Baker v. Carr*, 369 U.S. 186 (1962).

[21] 11 U.S. (7 Cranch) 116, 137 ("This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to [waive] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.").

> ting in judgment on the acts of another government done within its own territory." [22]

And even more explicitly, in *Oetjen v. Central Leather Co.*, the Court explained that:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . *rests at last upon the highest considerations of international comity and expediency.* To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments, and vex the peace of nations.' " [23]

The Act of State doctrine is only one of many applications by this Court of the principle of international comity. Thus, the comity principle has been invoked to determine the effect to be given by U.S. courts to foreign judgments in routine private litigation.[24] Comity has also served to define the extent to which U.S. courts must respect foreign laws or regulatory frameworks when ordering discovery of evidence located abroad,[25] or when

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[22] *See* Underhill, 168 U.S. at 252 *and Hatch v. Baez*, 14 N.Y. Sup. Ct. (7 Hun.) 596, 599 (App. Div. 1876).

[23] 246 U.S. at 303-04 (*quoting Underhill*, 65 F. at 579 (emphasis added)). *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 438 ("the act of state doctrine . . . shares with the immunity doctrine a respect for sovereign states"); *First Nat'l City Bank*, 406 U.S. at 762 (Op. of Rehnquist, J., for plurality) ("both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *id.* at 765 ("[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns."); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 352 (1909).

[24] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[25] *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

applying U.S. substantive laws extraterritorially.[26] And comity has been invoked in determining when U.S. courts should give effect to agreements for the resolution of disputes by foreign courts[27] or international arbitration tribunals.[28]

The doctrine of comity is not merely a vague, precatory notion of international courtesy and good-will. Instead, in numerous contexts, the principle of international comity has defined "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens. . . ."[29] As this Court has repeatedly held, comity therefore requires a sensitive analysis in particular cases of (1) foreign sovereign interests and public policies; (2) U.S. sovereign interests and public policies; and (3) the goal of an efficient and developed international system.[30] Applying this analysis, U.S. courts have

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[26] *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) ("acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations"; "considerations of comity, reciprocity and long-range interest"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

[27] *Bremen v. Zapata Off-Shore*, 407 U.S. 1, 9, 13-14 (1972).

[28] *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system").

[29] *Hilton v. Guyot*, 159 U.S. at 164. *See also* J. Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834).

[30] *See Aerospatiale*, 482 U.S. at 543-44; *Hilton v. Guyot*, 159 U.S. at 163-64 ("respective interests of the foreign nation and the requesting nation"); *Romero*, 358 U.S. at 383 ("the interacting interests of the United States and of foreign countries"); *Lauritzen v. Larsen*, 345 U.S. at 582 ("ascertaining and valuing points of contact between the transaction and the states or government whose competing laws are involved").

frequently concluded that "international duty and convenience" call for respecting and giving effect to foreign governmental interests and public policies.[31] The Act of State doctrine—which applies to peculiarly sovereign and sensitive acts by foreign states, consummated within their own territory—is the most emphatic example of this deference.

B. The Separation of Powers Doctrine.

Foreign nations would of course prefer that the Act of State doctrine begin and end with deference to their policies: The United States would respect the governmental interests and public policies of foreign states in every case, and U.S. courts would never adjudicate claims that called those interests into question. As most foreign states acknowledge, however, there are occasions in which important U.S. interests and public policies may require a different result.

Responsibility for articulating U.S. public policies in the international context lies with Congress and the President. This Court has repeatedly recognized the peculiarly broad authority of these political branches in the foreign relations and foreign commerce fields. Thus, the Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations."[32] And it has described the constitutional powers of the Legislative branch over foreign commerce in comparably broad terms.[33]

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[31] *See* notes 24-28 *supra*. *See also* G. Born & D. Westin, *International Civil Litigation in United States Courts* 14-18 (1989).

[32] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[33] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

The broad powers of the political branches in the international context are accompanied by a corresponding reluctance by U.S. courts to enter into areas where their rulings could interfere with the conduct of U.S. foreign relations. This reluctance has been repeatedly cited as one of the primary reasons for the Act of State doctrine. Thus, in *Oetjen v. Central Leather Co.*, this Court observed that

> "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." [34]

Even more explicitly, Justice Harlan explained in *Banco Nacional de Cuba v. Sabbatino* that, although "the Constitution does not require the act of state doctrine," the doctrine nevertheless has " 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." [35]

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[34] 246 U.S. at 302. Similarly, in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) at 146, Chief Justice Marshall explained that one of the reasons for deferring to the acts of foreign sovereigns was that "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign."

[35] 376 U.S. at 423. *Accord, First Nat'l City Bank*, 406 U.S. at 762 (Op. Rehnquist, J., for plurality) ("both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *id.* at 765 (the act of state doctrine "is also buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties").

Because it is a rule with "constitutional underpinnings" centering around concerns over U.S. relations with foreign sovereigns, the Act of State doctrine implicates powerful and uniquely federal interests. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *First National*

In short, the Act of State doctrine is born of the confluence of the two basic principles of comity among nations and separation of powers. The former principle calls on each nation to respect and give effect to the sovereign actions of other nations and thereby avoid conflict and confrontation. The latter principle specifies that, if the United States is to be involved in international conflict, that conflict should come through the articulated public policy decisions of the President and Congress—not through actions of the courts. Together, the two principles require generally that U.S. courts respect and give effect to foreign government interests and public policies except where the political branches have clearly and expressly articulated a public policy to the contrary.

III. THE ACT OF STATE DOCTRINE IS A FLEXIBLE RULE WHOSE APPLICABILITY MUST DEPEND ON THE NATURE OF THE FOREIGN SOVEREIGN ACT AND THE CHALLENGE BEING MADE TO THAT ACT.

The principles giving rise to the Act of State doctrine determine its scope and application in particular cases. These principles require that the Act of State doctrine remain a flexible rule, sensitive to the many varying exigencies and circumstances of international life, that cannot be reduced to wooden formulae.

City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611 (1983); *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2515-16 (1988). The Act of State doctrine is, therefore, a uniform rule of federal common law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 425 ("an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community *must be treated exclusively as an aspect of federal law*") (emphasis added); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1597 (1987).

Any rule based on the comity principle must depend upon a careful and flexible assessment of U.S. public policies, foreign public policies, and the needs of the international system. For example, in *Aerospatiale* the Court explained that the doctrine of international comity required a "delicate task of adjudication" that encompassed a "particularized analysis of the respective interests" of the U.S. and relevant foreign sovereigns.[36] And as Justice Joseph Story—this country's preeminent commentator on comity—explained: "comity is, and ever must be, uncertain. . . . it must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule. . . ." [37]

The Act of State doctrine also requires the flexibility to respond to many different types of foreign sovereign actions. These actions can take any of a wide variety of forms,[38] expressing a range of foreign sovereign interests of differing intensity and importance.[39] In the early

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[36] 482 U.S. at 543-44, 546.

[37] J. Story, *Commentaries on the Conflict of Laws* § 28 (1834). Or, in the Court's words in *Romero v. International Terminal Co.*, 358 U.S. at 383, comity does "not depend upon a mechanical application of a doctrine like that of *lex doci delicti commissi*."

Just as comity has been understood as prescribing a necessarily flexible analysis, the separation of powers doctrine generally calls for a case-by-case, pragmatic analysis. *E.g., Morrison v. Olson*, 108 S. Ct. 2597, 2620-22 (1988). This is particularly true in the field of foreign relations and foreign commerce powers. *E.g., Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("spectrum [of Executive power] running from explicit congressional authorization to explicit congressional prohibition").

[38] *See Salaman v. Secretary of State of India*, [1906] 1 K.B. 613, 640 ("Acts of state are not all of one kind: their nature and consequences may differ in an infinite variety of ways. . . .").

[39] *See Sabbatino*, 376 U.S. at 428 ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for

days of the Nation, this Court typically applied the Act of State doctrine to the seizures of ships by other nations during times of war or by colonists fighting for independence from European powers.[40] In *Underhill v. Hernandez*, the issue arose out of the imprisonment of an American in Venezuela by rebel forces during a civil war ultimately won by the rebels.[41] And in this century, the Court has most often dealt with the Act of State doctrine in sorting out the complicated consequences that have flowed from confiscation of property by foreign regimes.[42] At the same time, U.S. judicial proceedings can implicate foreign sovereign acts in many different ways, ranging from direct challenges to the validity of foreign acts to mere consideration of foreign sovereign acts as contextual background.[43]

Because foreign Acts of State can arise in such widely varying circumstances, this Court has expressly declined

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exclusivity in the political branches."); Restatement (Second) of Foreign Relations Law § 41, comment d (1965).

[40] *See The Santissima Trinidad, supra*; *L'Invincible, supra*; *Hudson v. Guestier, supra*. In invoking the doctrine, the Court made clear that it was important to preserve a U.S. policy of neutrality in the face of disputes among other nations and their colonies. *See, e.g., The Santissima Trinidad, supra*.

[41] 168 U.S. at 250-52.

[42] *See, e.g., Banco Nacional de Cuba v. Sabbatino, supra*; *First National City Bank, supra*. In addition to the situations thus far addressed by this Court, the state and lower federal courts have considered the doctrine in circumstances ranging from imposition of foreign exchange controls by Less Developed Countries to diverse private claims based on allegations of wrongdoing by high foreign government officials. *See, e.g., Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1597 (1987); *Republic of Philippines v. Marcos*, 818 F.2d 1473 (1987), *vacated*, 862 F.2d 1355 (9th Cir. 1988) (en banc); *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

[43] *See infra* pp. 22-23.

to "lay[] down or reaffirm[] an inflexible and all-encompassing rule" governing the Act of State doctrine.[44] Instead, it has specifically required careful examination of the "balance of relevant considerations" in particular categories of cases.[45] Similarly, lower federal courts have repeatedly emphasized the flexible, pragmatic character of the Act of State doctrine.[46]

IV. THE ACT OF STATE DOCTRINE PRECLUDES ADJUDICATION OF THE PRESENT DISPUTE.

To say that the Act of State doctrine is flexible and requires consideration of a wide range of factors is not to say that it is without structure. On the contrary, two basic and closely related requirements must be satisfied before the doctrine will be applied: (a) there must be an "Act of State"; and (b) adjudicating a dispute must require the U.S. court to "sit in judgment" on that Act of State. Both of these prerequisites flow directly from the comity and separation of powers principles that give rise to the Act of State doctrine. Applying these two prongs of the doctrine to the present case, we submit that this action should be dismissed on Act of State grounds because it would require the U.S. courts to "sit in judgment" on a foreign "Act of State."

A. This Foreign Government Contract Award Was An "Act of State."

The first question to be addressed in deciding whether the Act of State doctrine applies to the present case is

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[44] *Sabbatino*, 376 U.S. at 428.

[45] *Id. Accord, First Nat'l City Bank*, 406 U.S. at 774 (Powell, J., concurring in judgment) ("The balancing of interests, recognized as appropriate by *Sabbatino*, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government.").

[46] *E.g., DeRoburt v. Gannett Co.*, 733 F.2d 701, 703 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325-26 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983); *IAM v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

whether the relevant action of the foreign sovereign—the award of a government contract—was an "Act of State." As explained above, this Court has found a wide range of actions by foreign officials to be Acts of State. Nonetheless, it is abundantly clear that not all actions taken by foreign government officials are *ipso facto* Acts of State, entitled to the substantial deference afforded by the Act of State doctrine.[47]

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Court found that the refusal of intervenors appointed by the Cuban government to repay U.S. importers amounts they had been mistakenly paid was not an Act of State because there was no evidence showing that the intervenors had purported to exercise governmental power. 425 U.S. at 694. According to the Court, for the action of a foreign sovereign to be an Act of State, the "conduct in question [must have been] the *public act* of those with *authority to exercise sovereign powers*" [48] based on "statute[s], decree[s], order[s], [and] resolution[s]" of the foreign state.[49]

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[47] *Compare Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987) (acts of foreign debtor's trustees are not acts of foreign sovereigns); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1533-36 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985) (presidential expropriation decree is not an Act of State until property is actually seized), *with DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S 1159 (1985) (Act of State doctrine potentially is applicable to allegedly illegal loan to foreign head of state); *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979) (military procurement decision is Act of State).

[48] 425 U.S. at 693 (emphasis added).

[49] *Id.* at 694. Similarly, the ALI's recent Restatement (Third) of Foreign Relations Law § 443 (1987) expressly provides that the Act of State doctrine generally precludes U.S. courts from "examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on *other acts of a governmental character done by a foreign state within its own territory and applicable there*" (emphasis added).

Whether a given action of a foreign government official is entitled to treatment as an Act of State must be determined, not by labels, but by consideration of the extent to which the action expresses important sovereign interests or public policies of a foreign state. Various factors are relevant to this analysis, but none is, in and of itself, determinative. Most important is the extent to which foreign laws—whether constitutional provisions, statutes, administrative measures, executive decrees or judicial judgments—themselves purport to express a sovereign or public interest.[50] Also relevant is the degree to which an action implicates the core purposes and functions of independent nation-states—such as ensuring national defense, administering a system of public law and justice, organizing local political and governmental structures, providing basic social services and protections, defining national territory, and regulating private activities.[51] In this connection, one significant factor is the extent to which private individuals can and ordinarily do independently undertake the actions in question.[52] Another relevant consideration is the scope and

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[50] *See Alfred Dunhill*, 425 U.S. at 694-95 (referring to foreign law for evidence of sovereign interest or public policy); Restatement (Third) of Foreign Relations Law § 443, comment i (1987) ("An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character.").

[51] *Alfred Dunhill*, 425 U.S. at 693-95; Restatement (Second) of Foreign Relations Law § 41, comment d (1965) (an Act of State "involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes").

[52] In *Alfred Dunhill*, a plurality of this Court concluded that the Act of State doctrine did not extend to "the repudiation of a purely commercial obligation." 425 U.S. at 695. The "commercial exception" recognized by the plurality opinion was expressly limited to certain "purely commercial" acts, and is entirely consistent with this Court's more general approach of defining "Act of State" by

degree of authority of the foreign governmental official, or agent of the foreign state,[53] whose actions are subject to scrutiny.[54] Similarly, the importance and political sensitivity of any applicable governmental interests or public policies are also a pertinent consideration.[55] And finally, a foreign nation's action will more likely be treated as an Act of State if it can be said to have been taken within the nation's own territory, rather than in the United States or in a foreign territory.[56]

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reference to a variety of factors. *See also IAM v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[53] Acts of high foreign governmental officials are more likely than those of lower officials to constitute Acts of State. *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979) (excluding "ministerial" acts from Act of State doctrine). Acts of a foreign governmental official are more likely to be treated as Acts of State than are acts of private entities carrying out governmental directives. Nonetheless, where a private entity engages in conduct in a foreign state pursuant to foreign sovereign compulsion, a variation of the Act of State doctrine will often be applicable. *See Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). Similarly, there may be circumstances in which a private entity acts as an arm of a foreign state, thereby providing its actions with Act of State protection. *Cf. Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). On the other hand, where a private entity engages in purely private misconduct without foreign sovereign compulsion, approval or complicity, the Act of State doctrine is inapplicable. This was the result in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) ("there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped").

[54] *See, e.g., Mannington Mills*, 595 F.2d at 1293-94; *Alfred Dunhill*, 425 U.S. at 691 (actions by intervenors and statements by counsel are not Acts of State).

[55] *See* note 39 *supra*.

[56] In its classic formulation, the Act of State doctrine was applicable to acts of foreign states consummated within their own territory. *See Underhill*, 168 U.S. at 252; *Sabbatino*, 376 U.S. at

Applying these considerations to the present case, the activities of the foreign government here were clearly "Acts of State." The actions giving rise to this case occurred within the foreign state's territory and were taken by high-level government officials. Moreover, the actions were taken as part of a regularized governmental process that reflects important public policies that have in no way been repudiated by the foreign government. Most important of all, however, is the fact that the respondent's allegations in this case do not question the simple fact of a governmental contract award, but instead *challenge the integrity and regularity of the internal governmental decision-making process that led to the granting of the contract.* Regulating this sort of internal decision-making process is plainly at the heart of national sovereignty and implicates foreign public policies that bear as sharply on "national nerves" as any issue does.

B. Adjudicating Whether the Award of the Foreign Government Contract Was the Result of Bribery Would Require the U.S. Court To "Sit in Judgment" on the Foreign "Act of State."

Once this case has been found to involve an Act of State, it becomes necessary to ascertain whether litigating the action would violate the Act of State doctrine. As this Court explained in *Underhill v. Hernandez*, a U.S. court may not "sit in judgment" on a foreign Act of State.[57]

413-19; Restatement (Third) of Foreign Relations Law § 443 and comment b and Reporters' Note 4 (1987). Lower U.S. courts have denied Act of State treatment to foreign sovereign actions within the United States, *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), although some courts have held that even acts within the United States will be given effect if they are consistent with U.S. policy. *Id. See also Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985).

[57] *Underhill*, 168 U.S. at 252. *See also Hatch v. Baez*, 14 N.Y. Sup. Ct. at 599 ("courts of one country are bound to abstain from

The same formulation has been repeated in this Court's subsequent decisions [58] and was recently adopted by § 443 of the ALI's Restatement (Third) of Foreign Relations Law (1987).[59]

U.S. courts have considered whether they would be required to "sit in judgment" on a foreign Act of State in a wide range of circumstances. Often private litigants have sought damages [60] or injunctive relief [61] directly against foreign sovereigns for their allegedly unlawful Acts of State. In other cases, the complaint of one private party against another has rested upon the alleged invalidity or unlawfulness of a foreign Act of State.[62] And other actions have alleged the unlawfulness of activities by private entities that were compelled by foreign sovereigns [63] or were taken in the context of pervasive foreign governmental regulations or actions.[64] Sometimes the Act of State doctrine has been invoked in cases where the private party is alleged to have violated U.S. law by improperly procuring foreign sovereign acts through

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sitting in judgment on the acts of another government done within its own territory.").

[58] *See* note 5 *supra*.

[59] Restatement (Third) of Foreign Relations Law § 443 (1987) ("sitting in judgment on other acts of a governmental character").

[60] *Underhill v. Hernandez*, *supra*.

[61] *IAM v. OPEC*, *supra*.

[62] *Oetjen v. Central Leather Co.*, *supra*; *Ricaud v. American Metal Co.*, *supra*.

[63] *Interamerican Refining Co. v. Texaco Maracaibo, Inc.*, *supra*.

[64] *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 303 (1988).

fraud,[65] anticompetitive conduct,[66] or bribery.[67] Finally, U.S. courts have sometimes been asked to decide whether high officials of foreign governments have taken actions that would be illegal or politically embarrassing abroad.[68]

Whether a U.S. court will be required to "sit in judgment" on a foreign Act of State in these very different situations cannot be resolved by any simple formula. Instead, the inquiry goes to the heart of the Act of State doctrine and the principles of comity and separation of powers that underlie it. To apply the Act of State doctrine, a court must evaluate the extent to which ruling on the claim before it would undermine or conflict with important governmental interests or public policies of a foreign sovereign.

One important consideration in this analysis is whether the foreign state, or its officials, are defendants in the suit. If so, a U.S. court's inquiry is particularly likely to result in its "sitting in judgment" on a foreign Act of State.[69] Another important, but by no means conclusive, consideration is whether a U.S. court would be directly or indirectly required to hold a foreign Act of State unlawful or invalid.[70] If a U.S. court is required to adjudicate

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[65] *See Mannington Mills*, 595 F.2d at 1292-93.

[66] *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

[67] *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (1989).

[68] *See DeRoburt v. Gannett Co.*, 733 F.2d 701 (foreign President alleged to have secretly supported and made arguably illegal loans to separatist elements in neighboring country).

[69] *See, e.g., Underhill v. Hernandez, supra.* In contrast, where a foreign state *itself* brings an action in U.S. courts, the Act of State doctrine will virtually never be applicable to bar the foreign state's complaint. *See Banco Nacional de Cuba v. Sabbatino, supra.*

[70] *See Sabbatino, supra.*

the validity of a foreign Act of State, it is also important to consider whether this holding would be based on U.S., international, or foreign law. United States courts are particularly reluctant to consider whether a foreign Act of State violates the laws of the foreign state.[71]

Even if a U.S. court would not be required to rule on the technical legality or validity of a foreign Act of State, an important consideration is the extent to which the action would inquire into the fairness, honestly, integrity, or motivations of foreign governmental processes and officials.[72] When U.S. courts issue findings, or when U.S. litigants attempt to take discovery, on these and other matters that are of overriding concern to foreign states, they "sit in judgment" on foreign sovereign acts in the

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[71] *See Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 443 (2d Cir. 1940) ("the courts of this country will not examine the acts of a foreign sovereign within its own borders, in order to determine whether or not those acts were legal under the municipal law of the foreign state."); *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 F. 126, 129 (S.D.N.Y. 1918), *aff'd sub nom., The Claveresk*, 264 F. 276 (2d Cir. 1920); *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1984), *aff'd*, 2 H.L. Cas. 1 (1848) (English courts will not inquire whether sovereign act "was contrary to the laws of Hanover and Brunswick"); *American Banara Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). *See also* Restatement (Third) of Foreign Relations Law § 443, comment d (1987); Restatement (Second) of Foreign Relations Law § 41, comment f (1965) ("An agency of an acting state is in a better position than the courts of another state to decide whether a particular action is valid under its law. Also, reexamination elsewhere could be regarded a lack of respect for the institutions of the acting state.").

[72] The Restatement (Third) of Foreign Relations Law § 443, comment c (1988) ("probe the motives"), takes the position that inquiring into the motivations or purpose of foreign Acts of State may be precluded by the Act of State doctrine. Although the Restatement (Second) of Foreign Relations Law § 41 (1965) did not expressly include inquiry into motivations within its black-letter statement of the Act of State doctrine, the relevant comments suggest that such an inquiry could well trigger the doctrine. *Id.* at comments c & f.

most elementary fashion.[73] And, finally, determining whether an action would result in "sitting in judgment" on a foreign Act of State requires careful analysis of the plaintiff's claims and the asserted foreign Act of State. There will be circumstances in which adjudication of the plaintiff's claim will not require questioning the validity, legality, integrity or fairness of foreign sovereign acts—even when those acts form a part of the disputed transaction[74]

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[73] In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court held that the administration of certain state probate statutes by state courts unconstitutionally intruded upon the foreign relations authority of the federal government. The Court's decision rested principally upon the fact that the state courts had "launched inquiries" into whether certain rights were "merely dispensations turning upon the whim or caprice of [foreign] government officials," *id.* at 434, into "whether the representation[s] of consuls, ambassadors and other representatives of foreign nations [are] credible or made in good faith," *id.*, and into "the administration of foreign law [and] the credibility of foreign diplomatic statements," *id.* at 442. There is no reason that similar inquiries by federal courts into the credibility and motivations of foreign governmental officials would be less objectionable than those held unconstitutional in *Zschernig*.

Even in the purely domestic context, this Court has counselled against the examination of the motivations or purposes of governmental officials in most circumstances. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[74] For example, in *United States v. Sisal Sales Corp.*, 274 U.S. 268, 274-76 (1927), private defendants violated the antitrust laws by buying large quantities of sisal, *id.* at 274, making large loans to facilitate additional sisal purchases, *id.*, and entering into contracts with various private entities to maintain close control over the distribution and sale of sisal, *id.* Although one part of this conspiracy was the defendants' successful efforts to obtain discriminatory legislation in Mexico, *id.* at 276, this Court emphasized that the defendants had independently engaged in conduct violative of the antitrust laws and that the plaintiff did *not* complain "merely of something done by another government at the instigation of private parties." *Id.*

The Act of State doctrine precludes judicial consideration of the present case because it would have a U.S. court "sit in judgment" on a foreign Act of State. The respondent's lawsuit would require a U.S. court to determine whether a foreign government awarded a contract because high government officials were unlawfully bribed. No foreign government or its officials are parties to this action, and it may theoretically be correct that respondent's suit does not require a ruling that the foreign government contract is invalid.[75] Nonetheless, where a U.S. court is asked to decide publicly whether high foreign governmental officials accepted bribes—conduct that would violate foreign law—the actions requested of the U.S. court are necessarily inconsistent with foreign sovereign interests and public policy. The resolution of such questions is most appropriately confided to the foreign government that is involved, according to its own procedures, and at a time and in a format of its own choice. It is, after all, the foreign government that has the greatest sovereign interest in the detection and punishment of corruption by its own officials and with selecting the appropriate means for taking such steps. And, of course, the judgment that respondent seeks from the U.S. courts would publicly embarrass the foreign government about an issue—charges of official corruption—which necessarily touches on sensitive "national nerves."

C. The Political Branches Have Not Clearly Articulated any U.S. Public Policy Requiring Adjudication of this Dispute.

Because the Act of State doctrine is based on separation of powers principles as well as comity, there are cases in which U.S. policies require that the courts go forward even though doing so will result in their "sitting in judgment" on foreign Acts of State. For this to

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[75] There would, of course, be no doubt that the Act of State doctrine would apply to this action if the foreign state or its officials were named as defendants. *See Underhill v. Hernandez, supra.*

happen, however, the U.S. political branches must have clearly articulated a public policy requiring the judiciary to "sit in judgment" on particular categories of foreign sovereign acts. For example, the so-called "Hickenlooper Amendment" [76] removes a class of cases from the Act of State doctrine, while recent legislation dealing with international arbitration accomplishes a similar result.[77] Likewise, the so-called "treaty exception" to the Act of State doctrine requires judicial consideration of cases where the Senate and President have clearly expressed a public policy on a particular issue.[78]

Some members of this Court, as well as some lower federal courts, have concluded that the Act of State doctrine should not apply, even in the absence of a statute or treaty, if the Executive Branch publicly and expressly states that adjudication in U.S. courts will not be inconsistent with U.S. foreign policy.[79] This approach is

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[76] 22 U.S.C. § 2370(e)(2) (1982).

[77] 9 U.S.C. § 15 (1988).

[78] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428 (Act of State doctrine not applicable where there is "a treaty or other unambiguous agreement regarding controlling legal principles"). *See Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

Conversely, there may also be situations in which U.S. public policy reinforces a result counselled by principles of comity. In *Sabbatino* itself, for example, U.S. public policy, as expressed in ongoing bilateral and multilateral diplomatic efforts by the Executive, *see* 376 U.S. at 431-34, counselled for application of the Act of State doctrine.

[79] *See Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982) (dictum); *Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *Beck v. Manufacturers Hanover Trust Co.*, 125 Misc. 2d 771, 481 N.Y.S.2d 211 (Sup. Ct. 1984) (dictum); *First Nat'l City Bank*, 406 U.S. at 768 (Op. of Rehnquist, J.).

commonly referred to as the "*Bernstein* exception," after the lower court decision in which it was first asserted.[80] The *Bernstein* exception has been the subject of some controversy,[81] however, because it could involve the Executive Branch in the very sort of *ad hoc* and unpredictable decisionmaking with respect to foreign sovereigns that the political branches sought to avoid when Congress enacted the Foreign Sovereign Immunities Act.[82]

In the present case, the U.S. political branches have not clearly articulated a public policy that U.S. courts should hear this sort of private litigation concerning foreign official corruption. If anything, U.S. policy is to the contrary, for Congress specifically rejected a proposal

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[80] *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). *See* G. Born & D. Westin, *International Civil Litigation in United States Courts* 517-27 (1989).

[81] *See First Nat'l City Bank*, 406 U.S. at 773 (Op. of Douglas, J., concurring in result); *id.* (Op. of Powell, J., concurring in result); *id.* at 777 (Op. of Brennan, J., dissenting); *Braniff Airways, Inc. v. CAB*, 581 F.2d 846, 851 & n.18 (D.C. Cir. 1978) (dictum); *Hunt v. Coastal States Gas Producing Co.*, 570 S.W.2d 503, 507 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992 (1979).

[82] Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 Corn. L.Q. 461 (1963); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168 (1946); Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 Am. J. Int'l L. 280 (1974); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in*, 1976 U.S. Code Cong. & Admin. News at 6610-11. *See also Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961) (per curiam) (State Department suggestion of immunity in a clearly commercial case, made as *quid pro quo* to gain release of hijacked airplane); *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966); *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977* (eds. M. Sandler, L. Vagts & B. Ristau), *published in*, U.S. Department of State, *Digest of United States Practice in International Law* 1017 (1977).

that would have added a private cause of action to the Foreign Corrupt Practices Act,[83] leaving enforcement to U.S. governmental entities.

Moreover, the Department of State's communications with the District Court here did not contain any express "assurance from [the Executive] branch," that adjudication of respondent's claims would not "frustrate the conduct of the Nation's foreign policy." [84] For the Executive to invoke its authority as a political branch, it must state unequivocally that the action should go forward as a matter of U.S. foreign policy—not merely under its view of the law concerning the Act of State doctrine. The Department of State's letter in the present case expressed views only on a legal question—namely the applicability of the Act of State doctrine to inquiry into a foreign state's motivations. Based upon this legal conclusion (which we submit is unduly mechanical),[85] and the State Department's assumptions about the particular facts of this case, the letter concluded that the Department did "not believe the Act of State doctrine would bar the Court from adjudicating this dispute." [86] This is a con-

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[83] 15 U.S.C. § 78dd-1 (West Supp. 1989). The legislative history of the Foreign Corrupt Practices Act demonstrates that Congress expressly considered the issue of private enforcement but refused to grant a private cause of action. *See, e.g.*, S. 3379, 94th Cong., 2d Sess., 122 Cong. Rec. 12,604 (1976); *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379, and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976); *See also McLean v. International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987); *Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989); *Eisenberger v. Spectex Industries, Inc.*, 644 F. Supp. 48 (E.D.N.Y. 1986); *Lewis ex rel. Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985).

[84] *First Nat'l City Bank*, 406 U.S. at 769.

[85] *See also* Brief of the United States as *Amicus Curiae*, at 16-22 (June 1989).

[86] Petition for Writ of Certiorari, at A-75 (June 17, 1988).

sidered reasoned legal argument in the nature of an *amicus curiae* brief that is entitled to considerable weight *as a legal argument.* It is not, however, a "*Bernstein*" letter stating that the Act of State doctrine "should not" [87] be applied because of foreign relations concerns.[88] This Court therefore has no occasion to address squarely the question whether it should recognize the *Bernstein* exception to the Act of State doctrine.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reviewed and the complaint dismissed.

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[87] Compare the *Bernstein* letter submitted in *First National City Bank*, which stated that "the Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." 406 U.S. at 764.

[88] Indeed, to the extent the Legal Adviser's letter mentions foreign relations concerns, it states that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." Petition for Writ of Certiorari, at A-75 (June 17, 1988).

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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

W.S. KIRKPATRICK & CO., INC., *et al.*,
Petitioners,

vs.

ENVIRONMENTAL TECTONICS CORPORATION INTERNATIONAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 87-2066

W.S. KIRKPATRICK & CO., INC., *et al.*,

Petitioners,

vs.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

This *amicus curiae* brief is submitted in support of the respondent, Environmental Tectonics Corporation, International. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The American Bar Association (the "Association") is appearing as *amicus curiae* in view of its long-standing interest in avoiding impediments to the legal process in disputes having foreign aspects. The Association is concerned that the act of state doctrine has been unnecessarily expanded in the lower courts to deny litigants their day in court. When

applied, the act of state doctrine absolutely bars any adjudication in cases and controversies over which our courts have jurisdiction conferred by Congress or state legislatures. Because it preempts the normal legal process, the act of state doctrine should be sparingly applied and only for sound and persuasive reasons.

The Association desires to present a position that none of the parties before the Court will apparently argue. Specifically, this brief urges that in deciding this case, the Court should reconsider the rationale for the act of state doctrine and return the doctrine to its conflict of laws origins (and away from its current preoccupation with the conduct of foreign relations). Such an approach would ensure a more principled use of the doctrine in this and other cases. It would limit the situations where the doctrine could preempt the normal legal process, while enhancing the rule of law in litigation involving foreign state acts.

The Association has previously taken similar positions. Goal VIII of the Association ("to advance the rule of law in the world") has as one of its objectives "the development of the rule of law in . . . resolution of conflict between nations and between nationals of different nations." An overly broad application of the act of state doctrine, by contrast, frustrates the legal process and the rule of law in cases having foreign aspects.

More specifically, the Association has sought to reduce the number of situations in which the act of state doctrine is applied. In August 1984, the Association adopted a resolution recommending amendment of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, in accordance with eight principles. The fifth of those principles was to:

> Add a new [provision] which excludes application of the act of state doctrine by a foreign state in cases where the Act confers jurisdiction upon the federal

> courts to adjudicate claims for expropriation or breach of contract.[1]

Although the present case before the Court does not concern expropriation or breach of contract—but only whether a U.S. court may make a factual finding regarding the reasons for a foreign contract award—similar interests are at stake. This is a civil dispute between U.S. litigants under U.S. statutes, in a case where a U.S. court has undeniable jurisdiction. The claims are certainly no less susceptible to the judicial process than expropriation and breach of contract claims mentioned in the Association's above-quoted resolution. The Association's interest and goal in furthering the rule of law in disputes having foreign aspects would be impaired by expanding the act of state doctrine to cover this type of case. Indeed, such an extension of the doctrine will necessarily involve a rationale inconsistent with the Association's recommendations in this area.

SUMMARY OF ARGUMENT

A. The Court should reevaluate the basis of, and justifications for, the act of state doctrine as a necessary part of its decision in this case. Based on this Court's reasoning in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the lower courts have viewed the act of state doctrine as requiring them to make threshold assessments of the possible foreign relations implications of their decisions. If a judge believes that inquiry into a foreign state act will have foreign relations implications, the act of state doctrine may bar any further adjudication. Invoking the doctrine preempts all further legal proceedings. Yet, judges often lack the diplomatic materials and experience with which to predict if their

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[1] The Board of Governors of the Association adopted an additional resolution in November 1987 recommending support for an international convention on foreign state of immunity. That resolution recommended that any such convention "not preclude the further development of national remedies against foreign states consistent with general principles of international law."

actions will produce some foreign relations friction—or if any possible friction will be serious enough to warrant preemption of a court's Article III responsibility to hear cases and controversies over which it has jurisdiction.

The present case involves such a proposed preemption of the judicial process. Under the reasoning of the *Sabbatino* decision, the lower courts in this case faced a Hobson's choice. They could have simply deferred to the real foreign affairs experts, the State Department, which sent a letter to the district court; but that would have surrendered judicial independence to the executive. Or, they could have followed the logical thrust of *Sabbatino* (which they did), making stabs at predicting possible foreign relations implications of their actions as a prelude to hearing the case.

The reasoning of the *Sabbatino* decision overlooked the main historical foundations of the act of state doctrine. Originally, the doctrine was a conflict of laws rule in the broad sense. It essentially said that foreign courts and authorities are the appropriate bodies to review the validity of a foreign state's acts in its own territory—and under its own laws. U.S. courts were not to conduct this kind of judicial review. The doctrine simply allocated competence between U.S. courts and a foreign state's own authorities in reviewing the validity of foreign state acts performed in the foreign state's own territory.[2]

Returning the doctrine to its conflict of laws foundations (and away from its current foreign relations focus) will produce a more predictable and defensible rule. It will spare the courts from a task for which they are ill-equipped. It will spare litigants from foreign relations predictions by judges lacking foreign relations experience.

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[2] Where a foreign state act is claimed to violate an international principle but the court concludes that the international principle has not yet become a settled rule of international law, the only body of law under which the state act may be reviewed is, once again, the foreign state's domestic laws. This is the situation that essentially was found to exist in *Sabbatino*, 376 U.S. at 428-30.

B. The Association takes no position on whether principles other than the act of state may limit inquiry into the motivations or causes of foreign government action. Similar principles exist in the domestic context. If, however, the act of state doctrine is returned to its conflict of laws foundations, the doctrine itself ought not bar judicial inquiry in this case. The district court was not asked to review the validity of a foreign state act performed in that state's own territory, by applying the foreign state's own laws. The doctrine as a conflicts rule does not prevent our courts from engaging in normal fact-finding.

ARGUMENT

THE ACT OF STATE DOCTRINE SHOULD BE RETURNED TO A CONFLICT OF LAWS RULE

Respondent Environmental Tectonics Corporation, International ("ETC") seeks civil damages on grounds that petitioners allegedly won a Nigerian air force contract from ETC through bribery of Nigerian government officials. Unlike a criminal prosecution under the Foreign Corrupt Practices Act, however, ETC in this civil action had to allege more than payments or offers of bribery. ETC also had to allege that it was injured by such payments of offers. To establish a causal link between the alleged bribery and ETC's claimed injury, a trier of fact must find that the alleged bribery of Nigerian officials had a causal effect on the contract award to petitioners.

Petitioners claim that such a finding—indeed, any such inquiry by a U.S. court—is barred by the act of state doctrine. We submit that invoking the doctrine as a bar to the normal judicial process of fact-finding would be an unwarranted extension of the doctrine. Indeed, it would be a derogation from the judiciary's Article III responsibilities to adjudicate cases and controversies over which they have jurisdiction. *See Sabbatino*, 376 U.S. at 450-51 (White J., dissenting). Of

more immediate concern, however, the Court should reconsider the general basis for applying the act of state doctrine as part of its decision in this case.[3]

A. The Doctrine Should Be a Conflict of Laws Rule That Simply Precludes Judicial Review of the Validity of a Foreign State's Public Acts Under Its Own Laws

1. Traditionally, the act of state doctrine precluded U.S. courts from engaging in judicial review of (1) the validity (2) of a foreign state's public acts (3) fully performed within the foreign state's own territory. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400 (1964). The doctrine allocated competence as between U.S. and foreign courts to pass judgment on a foreign sovereign's public acts, based on principles of territoriality:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897). This principle was derived from the English common law. *See Sabbatino*, 376 U.S. at 416.

Until this Court's decision in the *Sabbatino* case, the act of state doctrine was a type of "conflict of laws" rule in the broadest sense. It allocated competence to review state acts between our judiciary and foreign judiciaries. It applied only to the review of foreign state acts performed in the foreign state's own territory—and, thus, presumptively governed by the foreign state's own laws. *Cf. American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("the character of

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[3] This Court has previously requested argument on the question, "Should this Court's holding in *Banco Nacional de Cuba v. Sabbatino*, . . . be reconsidered?" *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 422 U.S. 1005 (1975). However, this question was not reached in the eventual decision on the merits in that case. *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976).

an act as lawful or unlawful must be determined wholly by the law of the country where the act is done"). U.S. courts would not sit in judgment on the validity of such foreign acts of state, in the sense that our courts would not judicially review foreign state acts under the national laws of the foreign state. We similarly expected foreign courts not to review the validity of U.S. government acts under U.S. law.[4]

This conflicts rule did not apply to all acts of a foreign state. First, if the foreign state act was not fully consummated within the foreign state's own territory but required the assistance of U.S. courts to give effect to the act, U.S. courts would first determine whether the foreign state act was consistent with U.S. public policy. For example, if a foreign state attempted to expropriate property situated within the United States, U.S. courts would determine whether the expropriation was consistent with U.S. public policy regarding takings. If not, a U.S. court would not recognize the foreign state act as valid. *See Moscow Fire Ins. Co. v. Bank of New York*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd sub. nom. United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).[5]

Second, U.S. courts would not give effect to a foreign state act if doing so would amount to an enforcement of the foreign state's penal or revenue laws. *See Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *Moore v. Mitchell*, 30 F. 2d 600 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 18 (1930); *Sabbatino*, 376 U.S. at 413-14; *id.* at 447-50 (White, J., dissenting).

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[4] This conflicts rule was at one time based on considerations of comity and respect for other sovereigns. *See Sabbatino*, 376 U.S. at 458 (White, J., dissenting); Brief of the Republic of China as *Amicus Curiae*, at 8-12.

[5] Conversely, when it applies, the act of state doctrine overrides the normal conflict of laws rule that courts will not give effect to foreign laws repugnant to the public policy of the forum. The foreign state act is recognized even if contrary to public policy of the forum. *Sabbatino*, 376 U.S. at 446 (White, J., dissenting).

Third, even if a foreign state act had been fully consummated within its own territory, the earliest U.S. decisions did not recognize the act as valid if the act violated a settled principle of international law or the law of nations. In *Rose v. Himely*, 8 U.S. (4 Cranch.) 241 (1808), Chief Justice John Marshall reviewed the validity of a French court's condemnation of a ship within French territory, drawing a distinction between a review under the foreign country's own laws and a review under the law of nations:

> Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations . . . .

Id. at 276-77. *Cf. Hudson v. Guestier*, 8 U.S. (4 Cranch.) 293, 294 (1808) (U.S. courts may not review a foreign court judgment "unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice").

Early this century, however, this Court said that the doctrine applied even where a foreign state act was claimed to violate international law. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).[6] The ruling was not necessary to the decision, as the Court later recognized. *Sabbatino*, 376 U.S.

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[6] *Cf. Shapleigh v. Meir*, 299 U.S. 468, 471 (1937).

at 417. Nor did the ruling address the contrary reasoning in *Rose v. Himely* or in earlier British decisions.[7]

Notwithstanding the unsettled "international law" corollary to the doctrine, courts continued to apply the act of state doctrine as a conflict of laws principle—at least until *Sabbatino* was decided. As the Second Circuit stated when asked to review the validity of an act of the government of Spain:

> We agree, however, with the contentions of the defendants that the question of the *validity under Spanish law* of the secret decree, or of any other step in the purported acquisition of title to the silver by the Spanish government, is not open to examination by us. If these acts took place, they took place within Spain. It has been squarely held that the courts of this country will not examine the acts of a foreign sovereign within its own borders, *in order to determine whether or not those acts were legal under the municipal law of the foreign state.*

Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 443 (2d Cir. 1940) (emphasis added). *See also Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947) (a court "will not undertake to pass upon the validity under the municipal law of another state" of acts of that foreign state's officials); *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 F. 126, 129 (S.D.N.Y. 1918), *aff'd sub nom. The Claveresk*, 264 F. 276 (2d Cir. 1920).

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[7] *See Wolff v. Oxholm*, [1817] 6 M. & S. 92, 106, 105 Eng. Rep. 1177, 1182 (holding that a court was not bound to respect a foreign state ordinance "not conformable to the usage of nations"); *Republic of Peru v. Dreyfus Bros. & Co.*, [1888] 38 Ch. D. 348 (where an English court chose to disregard a Peruvian statute found to be contrary to international law, even though it purported to annul a contract executed and performed within Peru); *In re Fried Krupp Actien-Gesellschaft*, [1917] 2 Ch. D. 188, 193-94.

Some members of the Court have similarly acknowledged the conflict of laws roots of the doctrine. In cases involving expropriation of property in a foreign state's own territory, the doctrine has been described as related to "the conflict of laws rule, adopted in virtually all nations, that the lex loci is the law governing title to property." *Sabbatino*, 376 U.S. at 445 (White, J., dissenting).[8] More broadly, Justice White stated:

> We are not dealing here with those cases where a court refuses to measure a foreign statute against . . . the fundamental law of the foreign state itself. In those cases the judicially created act of state doctrine is an aspect of the conflict of laws rules of the forum and renders the foreign law controlling.

Id. at 470-71. Similarly, in an opinion joined by Justices Brennan and Blackmun, Justice Marshall noted that

> the act of state doctrine merely tells a court what law to apply to a case; it "concerns the limits for determining the validity of an otherwise applicable rule of law."

Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682, 726 (Marshall, J., dissenting), quoting *Sabbatino*, 376 U.S. at 438.

2. This Court's 1964 decision in the *Sabbatino* case has been extended far beyond its actual holding. *Sabbatino* involved a dispute over who was entitled to the proceeds from a sale of sugar that had been expropriated in Cuba by

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[8] In an opinion joined by then Judge Scalia, it was noted that such acts of state may be "grounded in the 'primeval interest' of a sovereign state to 'resolv[e] all disputes over use or right to use of real property within its domain.' " *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1569 (D.C. Cir. 1984) (Judge Starr, dissenting), *vacated*, 471 U.S. 1113 (1988), *quoting Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984).

the Cuban government. The former owners claimed the proceeds (which had been attached in New York) on grounds that the expropriation violated customary international law. This Court held only that rules of customary international law concerning "takings" were not sufficiently settled to permit U.S. courts to review the validity of the Cuban government's action under international law, and, thus, the act of state doctrine barred review by a U.S. court of the validity of the taking:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle. . . . Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Sabbatino, 376 U.S. at 428.[9]

This holding, however, was interwoven with an entire reformulation of the act of state doctrine and its basis. The Court announced that act of state was now a separation of powers doctrine whose "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Id.* The Court continued:

> It is also evident that some aspects of international law touch more sharply on national nerves than do others;

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[9] Congress has attempted to overturn this particular holding in 22 U.S.C. § 2370(e)(2).

> the less important *the implications of an issue are for our foreign relations*, the weaker the justification for exclusivity in the political branches.

Id. (emphasis added).[10]

Thus, the Court appeared to announce a new rationale for the doctrine, at least in those cases where it was claimed that a foreign state act contravened international law. The Court appeared to transform the doctrine from a conflict of laws rule into a balancing test based on foreign relations considerations. The Court seemed to invite lower courts to assess how important "the implications of an issue are for our foreign relations" when deciding whether to invoke the doctrine.

The lower courts have seized the invitation. They have ruled that the "act of state doctrine calls upon the courts to make a preliminary assessment . . . of 'the likely impact on international relations that would result from judicial consideration of the sovereign's act.' " *O.N.E. Shipping v. Flota Mercante Grancolombiana*, 830 F.2d 449, 452 (2d Cir. 1987), quoting *Allied Bank Int'l v. Banco Credito*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). They have held, without any expert guidance, that "any analysis by this court would have an adverse effect on the relations between this country and Mexico." *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982). They have similarly found it to be "clear" that any judicial scrutiny of foreign government decisions involving petroleum "would embarrass the political branches of our government in the conduct of foreign policy." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983); *see International Association of Machinists v. OPEC*, 649 F.2d 1354, 1359-61 (9th Cir. 1981), *cert denied* 454 U.S. 1163 (1982).

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[10] The majority in *Sabbatino* appeared concerned that if a proposed rule of international law was not settled and that if, instead, a U.S. court was asked to engage in "the sensitive task of *establishing* a principle," foreign relations implications could ensue. *Id.* at 428 (emphasis added).

Even when the doctrine has not been applied to bar an adjudication, the lower courts have undertaken to decide if lawsuits over which they have jurisidiction would have "the potential for interference with our foreign relations," *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976); or if an adjudication "might possibly present problems of international relations." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979).

Casting judges as assayers of foreign policy implications has also led, in some of our courts of appeal, to the expansion of the act of state doctrine at issue in this case. In *Clayco, supra*, the issue was whether allegedly unlawful payments to foreign officials caused (or motivated) the award of an oil concession. As here, the existence of the payments (and their receipt by foreign officials) was not the reason to invoke the act of state doctrine. Nor, as here, was the Court asked to review the validity of any state act. Rather, the court of appeals said that *any* judicial inquiry into whether those payments had a causal effect on the concession award would have foreign policy implications and "thus embarrassment would result from adjudication." *Clayco*, 712 F.2d at 407. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (holding that any judicial inquiry into the motivation of a state act would result in "hindering and embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine").

Even the court of appeals in the present case felt it had to venture into the arena of making foreign policy evaluations. It gave great "respect" to a letter the district court had received from the State Department suggesting no foreign policy embarrassment would result from an adjudication in this case. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (1989). But the State Department views could not be "controlling." *Id.* at 1057 n.6 and 1062, citing this

Court's split decision in *First National Bank v Banco Nacional de Cuba*, 406 U.S. 759 (1972). Hence, the court of appeals felt it had to make its own assessment of the foreign relations implications of continuing with this case—which proved to be different from the district court's assessment.

The current split in the circuits on the issue now before the Court can be directly attributed to differing assessments of foreign relations implications. Compare *Environmental Tectonics* and *Industrial Investment Development Corp. v. Mitsui*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) (finding no preclusive foreign policy implications where motivation—but not validity of a state act—was at issue), with *Clayco*, 712 F.2d at 407, and *Hunt*, 550 F.2d at 77. Simply put, the separation of powers rationale of *Sabbatino* asks judges to engage in foreign relations evaluations for which they generally lack the necessary diplomatic background and foreign policy experience. Conflicting evaluations are the inevitable result. Some litigants are able to have their claims heard; others are not.

3. The Court in *Sabbatino* apparently felt compelled to reevaluate the act of state doctrine, since it had not had occasion to consider the doctrine in the aftermath of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See Sabbatino*, 376 U.S. at 425. The Court concluded that the act of state doctrine, though a rule fashioned by the courts, "must be determined according to federal law." *Id.* at 427. It found ample constitutional and statutory support reflecting a need for national uniformity and "indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Id.* at 427 n.25. This part of the analysis was fundamentally sound and sufficient to support a federal rule.

Nevertheless, the Court apparently felt it could not base a federal rule on earlier rationales for the doctrine. It characterized these earlier rationales as based simply on "historic notions of sovereignty." *Id.* at 421. It then found that the doctrine was neither derived from international law nor required by the Constitution. *Id.* at 421-23. So it attempted

to build on statements in earlier decisions suggesting that if U.S. courts reviewed sovereign acts performed in the sovereign's own territory, international friction might arise. Thus, the Court announced that separation of powers considerations—as "constitutional underpinnings"—would henceforth be the basis for this federal, court-fashioned doctrine (at least where a state act was said to violate international law). *Id.* at 423.

For whatever reason, the majority in *Sabbatino* did not address directly the conflict of laws foundations of the doctrine, which are more than mere "notions of sovereign authority." Broadly speaking, conflict of laws is a set of rules "which determines what effect is given to the fact that [a] case may have a significant relationship to more than one state." *Restatement (Second) of Conflict Of Laws § 2 (1971).* As discussed above, the doctrine, until *Sabbatino,* allocated competence between our judiciary and foreign courts. A U.S. court is hardly the competent or appropriate body to declare a foreign state act invalid under "the fundamental law of the foreign state." *Sabbatino,* 376 U.S. at 470-71 (White, J., dissenting). Similarly, if a foreign state act performed in the foreign state's territory is claimed to violate an international principle which has not become a settled rule of international law (as found in *Sabbatino*), the only "law" by which the state act can be reviewed is, again, the foreign state's domestic law. Once again, U.S. courts are not the appropriate bodies to engage in such judicial review.

Recasting the act of state doctrine as a federal conflict of laws rule is supported by the same constitutional and statutory authorities relied on in *Sabbatino* for a separation of powers rule. *Sabbatino,* 376 U.S. at 427 n.25. The need is unquestioned for the nation to speak with one voice in defining the outer limits of our judicial power to review foreign

state acts. A federal rule is no less supportable when based on conflict of laws considerations than when dressed up in "separation of powers" garb.[11]

Compelling reasons exist for the Court, in deciding this case, to return the act of state doctrine to its traditional foundation as a conflict of laws rule of federal dimension. First, in deciding this and other act-of-state cases, a conflicts rule provides a readily ascertainable standard that the lower courts and state courts can consistently apply. A court need only determine if the case before it requires review of the validity of a foreign state act fully performed in the foreign state's own territory and governed by the foreign state's own laws. If such review of validity is required, the doctrine bars adjudication of that issue (and of the remaining parts of the case if they cannot be segregated); otherwise, the case proceeds in the normal fashion. As it did in *Sabbatino*, the Court can leave to a future case the question of whether validity may be reviewed under a settled rule of international law or under a treaty provision.[12]

Second, so long as "foreign policy implications" remain the touchstone of the act of state doctrine, the lower courts (and litigants) will face an untenable situation. On the one hand, they cannot simply let the State Department dictate

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[11] *See* Leigh & Sandler, *Dunhill: Toward A Reconsideration of Sabbatino*, 16 Va. J. Int'l L. 685, 709-16 (1976); *cf. Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2513-16 (1988). *See also* Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68, 90-91 (1985).

[12] Since *Sabbatino* was decided, at least one court of appeals has held that a foreign state's expropriatory acts performed within a foreign state's own territory can be reviewed under an international rule contained in a treaty or international agreement. *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984). Compare *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981), with *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118 (5th Cir. 1985).

when a case will be adjudicated, or barred, by abject deference to the agency that has the actual foreign policy expertise. Such a course would strip the judiciary of its independence. *See Dunhill*, 425 U.S. at 725-26 (Marshall, J., dissenting). On the other hand, allowing the current situation to be perpetuated requires judges to make inexpert pronouncements (or guesses) about the foreign relations consequences of a case, as a prelude to exercising customary judicial functions. Judges are presumptive experts in applying a conflict of laws rule, but presumptive laymen in trying to predict foreign relations implications of their acts.

Third, no overriding reason exists for the courts to make foreign relations assessments a part of an act of state doctrine. No such endeavor has been found necessary for other judicial actions that have the potential for foreign relations implications. As noted above, U.S. courts will not honor a foreign state's expropriation of property situated in the United States if the taking is not consistent with U.S. public policy. Neither will U.S. courts give effect to a foreign state's penal or revenue laws, irrespective of the foreign relations impact. *See Sabbatino*, 376 U.S. at 413-14. U.S. courts routinely decide (without regard to foreign affairs concerns) whether persons wanted by a foreign state will be extradited, even though there may be foreign relations implications to the extradition proceedings. In contested criminal prosecutions under the Foreign Corrupt Practices Act, U.S. courts and juries may be called on to make detailed inquiries concerning the taking of bribes by foreign government officials. Even a plea agreement may involve offers of proof implicating foreign officials. *See Environmental Tectonics*, 847 F.2d at 1056. Courts regularly interpret treaties, without first determining the impact of the potential interpretation on relations with any foreign state. *See Kolovrat v. Oregon*, 366 U.S. 187, 194-96 (1961); *cf. Zschernig v. Miller*, 389 U.S. 429, 432 (1968). In none of these situations has the need arisen to ask the lower courts to make assessments of foreign relations implications before deciding whether to hear the case.

There may be a future case when the actual foreign policy experts, the executive branch, may believe that an adjudication relating to a foreign state act may have an impact on the immediate conduct of foreign relations. There has been *no* such case to date—not even on remand in *Sabbatino*—where the executive has felt compelled to ask a court to apply the act of state doctrine.[13] More to the point, there are other legal tools to deal with such a situation. As in the Iranian hostage crisis, the executive branch may seek to stay litigation for an extended period, pending resolution of a crisis. *E.g., Chas. T. Main Int'l v. Khuzestan Water*, 651 F.2d 800, 804 n.4 (1st Cir. 1981); *see Sabbatino*, 376 U.S. at 471 (White, J., dissenting) ("The proper disposition is to stay the proceedings until circumstances permit an adjudication . . . "). Or, if a U.S. citizen's claim is against a foreign government or its agencies, the U.S. government may "espouse" the claim and settle it in certain circumstances. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-88 (1981); *United States v. Pink*, 315 U.S. 203, 229-30 (1942); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (1984) (per Judge Scalia). If foreign policy interests require a protective order or other special procedures, the government may file a suggestion of interest with any court under 28 U.S.C. § 517. It may also advise any court of foreign policy determinations affecting factual issues in a case. *See, e.g., Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231, 232 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). Under other conflict of laws and comity principles, U.S. courts have self-imposed limits on compelling discovery of foreign documents and information. *See Societe Internationale v. Rogers*, 357 U.S. 197 (1958). Foreign government

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[13] *See* letter of the Department of State's Legal Adviser to the Solicitor General, appended to the opinion of the Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976); and the letter of the State Department's Legal Adviser to the district court appended to the opinion of the court of appeals below, *Environmental Tectonics*, 847 F.2d at 1067-69. Similarly, the executive branch has never used its post-*Sabbatino* statutory authority to invoke the act of state doctrine in expropriation cases when required "by the foreign policy interests of the United States." 22 U.S.C. § 2370(e)(2).

claims of executive privilege have been recognized in U.S. courts. *See Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984); *cf. Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586 (D. Mass. 1979). U.S. courts may decline to exercise jurisdiction under the doctrine of *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Of course, some issues bearing on foreign relations may not be susceptible to resolution under ascertainable legal standards and, thus, nonjusticiable under the "political question" doctrine. *See Goldwater v. Carter*, 444 U.S. 996 (1979).

The act of state doctrine, even if properly founded as a conflict of laws rule, will have ancillary benefits in the area of foreign relations. But no logical or empirical reason exists why foreign relations implications must be the central touchstone of this court-made rule. A "conflict rule would have been enough in itself to have controlled the outcome of most of the act of state cases decided by this Court." *Sabbatino*, 376 U.S. at 445 (White, J., dissenting).

For the reasons stated, the doctrine need not put judges in the position of making foreign relations determinations, or put litigants at the mercy of those determinations. Before deciding if the doctrine applies in the case now before the Court, we urge the Court to reconsider the doctrine's proper basis and to return the doctrine to its conflict of laws foundations.[14]

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[14] *Stare decisis* does not preclude reconsideration. The holding in *Sabbatino* is not at issue here, but only a portion of its reasoning that appears unworkable. *See Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ("Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice"). Of course, "adherence to precedent is not rigidly required in constitutional cases . . . ." *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984). The act of state doctrine, moreover, involves neither a statutory nor a constitutional standard, but simply a Court-made rule of federal common law that is intended to survive *Erie v. Tompkins*. As demonstrated, the

(footnote continues)

B. A Factual Inquiry Into The Causes Of A Foreign State Act Is Not Barred By The Act Of State Doctrine Itself.

1. The Association takes no position on the ultimate merits of this case. The logic of the position expressed in part A above, however, indicates that the act of state doctrine should not be applied in this case.

As a conflict of laws rule, the act of state doctrine addresses the competence to review the validity of foreign state acts. It is not a bar to judicial fact-finding. The district court below was not asked to declare the contract award invalid under Nigerian domestic law. Nor was the district court asked to review the Nigerian contract award under international principles which are not sufficiently settled to be treated as rules of international law (thus leaving Nigerian law as the only system of applicable legal rules). Indeed, the contract award may be entirely lawful under Nigerian law; that issue is not before the Court. Since neither the validity nor the legal effect of the contract award itself is at issue, the act of state doctrine should not be applied.

2. The Court might consider other principles, *not* part of the act of state doctrine, that would limit the ability of U.S. courts to review the motivations or causes of foreign government actions. In a domestic context, the Court has placed limitations on reviewing the motivations underlying the actions of cabinet officials and Congress. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In this area, a distinction is sometimes drawn between subjective influences on government action and the avowed purposes and causes of

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(footnote continued)

rationale for this rule as announced in *Sabbatino* involved a departure from earlier jurisprudence supporting the doctrine. The Court subsequently appeared to question this rationale when, in the *Dunhill* case, it asked for reargument on whether the *Sabbatino* holding should be reconsidered. *Dunhill*, 422 U.S. 1005.

an act as stated in official pronouncements such as a legislative history. *See Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). Policy reasons, however, may exist in special cases for examining subjective influences on a government decision—such as where the decisionmaker has been bribed. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965).

The germs of such an approach in the foreign context appear in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Although sometimes characterized as an "act of state" case, *American Banana* itself did not purport to apply the act of state doctrine. The Court simply held that the antitrust laws did not extend to acts committed in a foreign country—incuding efforts to persuade a foreign state to act against a competitor. The Court also declared that "persuading a foreign power to do this or that cannot be a tort," at least not under the law of the foreign power. *Id.* at 358.

Any rule limiting inquiry into the reasons or motivations for a foreign state act would involve different considerations than a rule completely barring judicial review of a foreign state act's validity. For example, policy reasons often exist for not probing the mental processes of government officials. *See United States v. Morgan*, 313 U.S. at 422. Certain types of influences on government conduct (foreign or domestic) may not be susceptible to judicial measurement. *See United States v. O'Brien*, 391 U.S. at 383-84. In some cases, however, policy reasons might support inquiry into the decision process, or Congress may have authorized such an inquiry by the courts.

No record has been made in this case against which such principles might be developed or applied. Because the act of doctrine was invoked before any discovery or evidentiary proceedings occurred in this case, ETC has not yet had an opportunity to present or obtain its proof regarding the reasons for the contract award. It is possible that ETC or the

petitioners may have access to documents stating or indicating the reasons for the award. Or perhaps payments to officials are not prohibited in Nigeria and, for this or other reasons, Nigerian officials or others may be willing to furnish proof of the reasons.

Conversely, ETC may face obstacles in meeting its burden of proof on the issue of causation. It may be faced with claims of government privilege. Nigeria may refuse to honor letters rogatory. Objective evidence of the reasons for the award may not exist. These possibilities, however, are not presently before the Court. The Association takes no position on these latter issues.

CONCLUSION

For the reasons and on grounds set forth above, the act of state doctrine should be returned to a conflict of laws rule.

Respectfully submitted

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